UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Deletions)

VOL. 44 NO. 6

In re: GEORGE W. SAYLOR, JR.

P&S Docket No. 5753

Decision and Order on Remand

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PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered by the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for a hearing. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register.

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151–158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume and page, for illustration, 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D–578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

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NOTE

Due to its voluminous size, this decision and order, issued by the Judicial Office is being published in this separate issue of Agriculture Decisions.—Editor.

COURT DECISION

GEORGE W. SAYLOR, JR. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. No. 83-1314. (USDA P&S Docket No. 5753) Decided December 21, 1983.

Gerard D. Eftink, Kansas City, Missouri, for petitioner.
Raymond W. Fullerton, Assistant General Counsel, U.S. Department of Agriculture, for respondent.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

Before PELL and CUDAHY, Circuit Judges, and ROBERT A. GRANT, Senior District Judge, Northern District of Indiana, sitting by designation.

CUDAHY, Circuit Judge.

[1] George W. Saylor, Jr., petitions for review of a United States Department of Agriculture ("USDA") determination that he sold livestock at false weights and charged commissions greater than agreed upon in violation of the Packers and Stockyards Act (the "Act"), 7 U.S.C. §§ 181 *et seq.* The USDA imposed a $10,000 civil penalty and suspended Saylor as a registrant under the Act for eight months. This court has jurisdiction to review the USDA's decision under 28 U.S.C. § 2342. Because, as detailed below, we agree with Saylor that the USDA did not adequately explain the basis for its decision, we remand the case for further proceedings.[1]

[2] The legitimacy of an adjudication by an administrative agency depends to a great extent on the availability of effective judicial review. *See Crowell* v. *Benson,* 285 U.S. 22, 48-54, 52 S.Ct. 285, 291-93, 76 L.Ed. 598 (1932). The Administrative Procedure Act (the "APA") recognizes the importance of judicial review when it provides that agencies must explain the basis for their decisions, "on all material issues of fact, law, or discretion . . . ." 5 U.S.C. § 557(c)(3)(A). The Supreme Court has instructed us to review agency decisions only on the basis of the reasons given in the agency's order or opinion. *Securities and Exchange Comm'n* v. *Chenery Corp.* 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). "Even if

[1] Because of our resolution of the case, it is not necessary to reach Saylor's contention that the decision is not supported by substantial evidence. We note, however, his claim that the investigation and hearing did not afford due process. He supports this claim with arguments directed at the circumstantial evidence relied upon by the USDA and the hearsay nature of much of the testimony at the hearing. These aspects, he claims, made it impossible for him to present a meaningful defense. We do not agree that the use of circumstantial evidence and hearsay testimony amounted to a violation of due process in this case. However, the weight to be accorded this evidence is less than if it had been direct, non-hearsay and highly probative.

the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings for the reasons stated by the agency." 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.29 at 128 (2d ed. 1980).

[3] The USDA accused Saylor of arbitrarily raising the weights of cattle he purchased for his customers. Apparently, Saylor's customers place orders for cattle which he purchases for them at market, charging a commission of 25 cents per hundred pounds. In the fourteen transactions involved in this litigation, the weight of the cattle billed to the customers exceeded the weight of the cattle purchased by Saylor at the market, sometimes by very little, but at other times by more than three percent. Further, Saylor collected commissions that exceeded the allegedly agreed upon 25 cents per hundred pounds.

The USDA did not believe Saylor's explanation of the undisputed discrepancy in the weights. Saylor claims that his usual practice was to bring the cattle he purchased at the market to his stockyard in Pittsfield, Illinois, before sending them to his customers. At his yard, he contends, he inspected them for uniformity, defects and breed, and substituted cattle from his inventory for cattle in the purchased lot when he thought such substitution would better serve his customers' needs. The substituted cattle were usually heavier than those removed, thereby increasing the weight of the entire load in each of the transactions. In fact, at least six customers testified that they were aware of the practice and approved of it. At least one of these customers testified that he observed Saylor sort the cattle at the Pittsfield yard in a transaction challenged here.

The USDA concluded that Saylor did not sort the cattle and that the added weight in all of the transactions was an arbitrary amount computed solely to increase the selling price. In at least eleven of the fourteen transactions under review, the USDA concluded that the cattle were shipped directly from the point of purchase to the customer. The USDA apparently based this conclusion on the truckers' trip sheets and shipping invoices, which usually did not show a stop at Saylor's yard. Further, the truckers billed for shipments at the original weight of the cattle purchased at market and not for any additional weight allegedly added during the sorting process. However, the USDA does not explain why it apparently rejected the contrary, undisputed testimony of a number of ostensibly disinterested witnesses. Neither does the USDA explain why it rejected Saylor's sorting explanation with respect to the three loads which indisputably stopped at Saylor's

yard. Nothing in the record explains why the USDA found the truckers' documents to be so reliable as to be fully dispositive with no discussion of other evidence. No testimony indicated that all truckers (or these truckers in particular) keep the sort of records the USDA assumes they do. We cannot uncritically accept the USDA's unsupported assertion that the truckers' invoices and trip sheets are conclusive in the face of the argument that the billing differences for the increased weight and travel to Pittsfield would have been *de minimis* and therefore the Pittsfield travel would not necessarily have been recorded.

The USDA also contends that the invoices and scale tickets prepared by Saylor and his employees "show signs that they were fabricated subsequent to the events themselves." However, the USDA points to nothing in the record to support this argument except an isolated incident of apparent misdating of an invoice. Further, the USDA does not answer Saylor's showing that often the invoices and payments were made so close together in time as to preclude any explanation other than that the trucker personally brought the invoice from Pittsfield to the customer after having stopped in Pittsfield with the cattle. The USDA bases its distrust of the scale tickets in part on the failure of those tickets to be produced at the initial audit conducted by William Kostelecky of Saylor's business. However, it is unclear from the record whether Kostelecky requested this information. In any event, the USDA did not call Kostelecky to testify at the hearing. We recently approved the USDA's practice of drawing an adverse inference from a party's failure to call a potentially important witness. *See Mattes* v. *United States,* 721 F.2d 1125 at 1130 (7th Cir. 1983). What is sauce for the goose is sauce for the gander, and we believe a like inference may be drawn here against the USDA.

We also find puzzling the finding by the USDA that the weight tickets do not show the actual weight of the cattle but instead reflect a "calculated weight" which includes an allowance for shrinkage of the cattle in transit. This admitted practice of taking a "pencil shrink" is condemned by the USDA as a blatant violation of the Act. However, the USDA also found that the cattle never stood on Saylor's scales. It is unclear to us how the USDA can contend that the cattle were not weighed at Saylor's yard while also arguing that Saylor violated the Act by inaccurately weighing the cattle. Perhaps the USDA means that the "pencil shrink" was just another arbitrary increment added over and above the other additions to the weight. In any event, the USDA's explanation is not clear enough for us to be confident of its precise meaning. Proper

judicial review is difficult because of our uncertainty about what facts the USDA actually found.

The questions surrounding the method of accounting for shrinkage in transit present another problem for review. The USDA appears to have concluded, as discussed above, that estimating the shrink factor, as Saylor admittedly did, constitutes a violation of the Act. Saylor claims that estimating and penciling in a shrink factor is a common practice among livestock dealers and is accepted by his customers. Several customers testified at the hearing that they were aware of the practice and approved of it. The USDA has not adequately explained its basis for an apparent blanket condemnation of what may be a widespread and arguably legitimate practice in the trade. The USDA may have good reasons for disapproving of this practice, but, under the circumstances of this case, it must clarify them.

In addition to the problems we have noted, there may be several other USDA conclusions for which there appears to be inadequate support. We are concerned about the lack of a clear statement of reasons—especially in light of the severe penalties imposed by the USDA.

Because the USDA failed to explain adequately the reasons for finding petitioner George W. Saylor, Jr., in violation of the Act, the case is remanded to the USDA for further proceedings in accordance with this opinion.

So ordered.

DISCIPLINARY DECISIONS

In re: GEORGE W. SAYLOR, JR. P&S Docket No. 5753. Decided September 20, 1985.

Dealer—Invoices showing other than correct weights—Collecting from purchasers based on false weights—Collecting from principals at prices other than actual purchase prices, and using other than actual purchase weights—Accounts and records—Civil penalty—Suspension of registration.

The Judicial Officer affirmed Judge Weber's order suspending respondent for 8 months and assessing a $10,000 civil penalty for adding arbitrary amounts of weight by pencil to sales based on respondent's purchase weights, and charging commissions greater than the agreed-upon rates. Complainant need only prevail by a preponderance of the evidence. Individual facts are not considered in isolation, but, rather, the totality of facts is considered as a whole. Circumstantial evidence is enough to prove violations. Press releases are routinely issued in P&S cases. An agent owes the highest degree of loyalty to his principal. Laws of statistical probability relied upon. Arbitrarily adding weight by pencil is a blatant violation of law. Pencil shrink described. Printing scale tickets that include "shrink" would have been an outrageous violation of law. Recordkeeping violations are serious violations of law. Technicalities of court pleading are not applicable. Failing to print all scale tickets required to prove transfer weights would have been an outrageous violation of law. Adverse inference drawn against respondent for not calling key witness. No adverse inference drawn against complainant for failing to call auditor who did not play major role in investigation. Gentry's testimony as to what records Kostelecky requested would not be hearsay when offered only to show that Kostelecky made the request. It is not unusual for a person engaged in weight fraud to vary the amount of weight added or subtracted considerably. The ALJ's determination of the credibility of witnesses is entitled to considerable weight. The fact that respondent's customers were satisfied is irrelevant. Whether an 8-month suspension order will affect respondent's ability to continue in business is irrelevant. When a provision is included in one section of a statute, but omitted in another, it should not be implied where omitted. USDA's severe sanction policy explained. A respondent must introduce evidence that he is unable to pay a civil penalty. Affirmative action cease and desist orders should be issued in future cases.

Thomas C. Heinz, for complainant.
Gerard Eftink, Kansas City, Missouri, and *Elizabeth Takahashi*, Pittsfield, Illinois, for respondent.
William J. Weber, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER ON REMAND

Note: This Decision and Order on Remand is bound with a
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IV. In Transaction 6, 16 Circumstances Compel Me to Infer that the 87 Steers Sold to Don Adams, Delavan, Wisconsin, on September 14, 1978 Were the Same 87 Steers Purchased by Respondent's Agent, Ed Van Ee, the Day Before in Springfield, Missouri, to Which Respondent Added Exactly 2% to the Weight by Pencil, and that Respondent's Worksheet (Showing 12 Head Substituted at Pittsfield) and Scale Ticket Were Fabricated to Cover Up His Fraud.....

A. On September 13, 1978, Respondent's Agent, Ed Van Ee, Purchased 87 Steers in Springfield, Missouri, Weighing 43,770 Pounds for Don Adams. Respondent Invoiced Adams the Next Day for 87 Steers Weighing Exactly 2% More, *i.e.*, 44,645 Pounds. Respondent's Agent, Ed Van Ee, Also Purchased 67 Steers Weighing 42,150 Pounds on the Same Date (September 13, 1978) at the Same Place for Carroll Long, Which Respondent Sold to Long in Transaction 2 at an Increase in Weight of Exactly 2% (Allegedly Caused by Substituting 13 Head at Pittsfield). Respondent's Agent, Ed Van Ee, Purchased a Third Lot at the Same Time, with Unknown Results. Two Increases of Exactly 2% from the Same Purchase of Three Lots Would Occur, by Chance, 1 Time in 41,152.

B. Respondent's Transaction 6 Worksheet Shows the Pittsfield Arrival Weight of 87 Head, Shrink Computed at 25 Pounds Per Head, the Weight of 12 Head Removed (Increased by 300 Pounds of Prorated Shrink, *i.e.*, 25 Pounds Per Head), the Weight of 12 Head Substituted from Inventory, and the Resulting Invoice Weight of 44,645 Pounds. Respondent's Scale Ticket Shows the Same Total Weight, 44,645 Pounds, but with 400 Pounds of "Pro Rate" on "16 hd".....

C. Mrs. Manson Could Not Explain Why There Was Only 100 Pounds of Prorated Shrink on 16 Head on the Scale Ticket. Respondent's Explanation Was Perjured Nonsense.....

D. Twelve Additional Circumstances on Which I Base My Inference that Respondent Fabricated the Worksheet and Scale Ticket in Transaction 6 to Cover Up His Pencil Addition of Exactly 2% to the Purchase Weight of 87 Steers Purchased the Day Before by Respondent's Agent.....

E. The Trucker's Testimony, Although Mildly Supportive of Complainant's Position, Is Too Weak to be Relied Upon. There Is No Testimony from the Customer, Don Adams.....

F. Respondent Cheated Don Adams Out of $625.15.....

V. In Transaction 2, 16 Circumstances Compel Me to Infer that the 67 Steers Sold to Carroll Long, Pleasant Hill, Illinois, on September 15, 1978, Were the Same 67 Steers Purchased by Respondent's Agent, Ed Van Ee, at Springfield, Missouri, on September 13, 1978, to Which Respondent Added Exactly 2% to the Weight by Pencil, and that Respondent's Worksheet, Showing 13 Steers Removed and 13 Added from Respondent's Inventory, and Scale Ticket Were Fabricated to Cover Up Respondent's Weight Padding....2426

A. Sixteen Circumstances Relied Upon in Transaction 2....2426

B. Respondent Cheated Long Out of $558.12 in Transaction 2. The Fact that Long Was a Satisfied Customer Is Irrelevant....2439

VI. In Transaction 8, Nine Circumstances Lead Me to Infer that When Respondent Sold 189 Steers to Roger Jennings, Palmyra, Illinois, on October 13, 1978, Respondent Added 10 Pounds Per Head by Pencil to 58 Steers Purchased at Kansas City as Lot No. 62, and that Respondent Did Not Make a Mistake in Computing the Pencil Shrink on 85 Steers Purchased in Huntsville, Missouri, as He Claims....2440

A. Respondent Purchased 58 Steers in Kansas City on October 12, 1978, Without "Pencil Shrink," Weighing 38,665 Pounds. At About the Same Time, Respondent Purchased 131 Steers, Consisting of 46 Head and 85 Head, in Huntsville, Missouri, with 3% "Pencil Shrink," Resulting in Respondent Paying for 92,247 Pounds. The Three Lots Totalled 189 Head, and Respondent Paid for a Total of 130,912 Pounds. Respondent Sold the 189 Head to Roger Jennings on October 13, 1978, at 131,492 Pounds, 580 Pounds More Than Respondent's Purchase Weights....2440

B. Respondent's Worksheet Shows that Jennings Was Charged on the Basis of 2% Pencil Shrink, Rather than 3% Pencil Shrink, on the 85 Head Lot Purchased at Breckon Farms, for a Mathematical "Error" of 586 Pounds, Which Does Not Precisely Explain the Invoice "Error." However, the Pencil Addition of 10 Pounds Per Head on the 58 Head Lot Purchased at Kansas City Without Pencil Shrink Does Precisely Explain the Invoice "Error." Mrs. Manson Paid Breckon Farms at the Correct 3% Shrink Rate on the Same Date She Invoiced Jennings for an Extra 580 Pounds....2446

C. Respondent Did Not Send Jennings a Check for $380.90 for the Alleged Pencil Shrink Error Until July 2, 1980, Almost 1 Year and 9 Months After the Fact, and Over 2 Months After the Complaint Was Filed in this Proceeding....2449

D. Nine Circumstances Lead Me to Infer that the Weight Increase in Transaction 8 Resulted from Respondent's Pencil Addition of 10 Pounds Per Head on the 58 Head Purchased Without Shrink at Kansas City....2454

E. Evidence from the Customer Offers No Support for Respondent, and Is Mildly Supportive of Complainant's Position. Truck Driver Evidence Is Irrelevant Since Respondent Admits the Truck Did Not Come to Pittsfield.....2455

F. Respondent Made a Net Profit of $3,289.51, and Cheated Roger Jennings Out of $377.....2457

VII. Arbitrarily Adding Weight by Pencil Is a Blatant Violation of Law. Printing Scale Tickets that Showed More Weight than the Weight of Livestock on the Scale, and Failing to Print Scale Tickets to Document All Weight Figures Needed to Prove a "Transfer of Weights," Would Have Been Such Blatant Violations of Law that Respondent's Claim that He Did So Is Not Believable. Pencil Shrink Is Not Involved in Any of Respondent's Alleged Reweighing Transactions. Complainant's Investigation Was Adequate.....2459

A. Arbitrarily Adding Weight by Pencil Is a Blatant Violation of Law.....2460

B. The "Universal" Practice of Selling Livestock With Pencil Shrink Is Not Relevant to Any of Respondent's Alleged Reweighing Transactions.....2460

C. Printing Scale Tickets that Did Not Reflect the Actual Weight of Livestock on the Scale, and Failing to Print All Scale Tickets Required to Support Invoice Weights, Would Have Been Such Blatant Violations of the Act and Regulations that Respondent's Claim that He Did So Is Not Believable. Complainant's Investigation Was Adequate.....2464

1. Lawful Method of Transferring Weights with Substituted Animals.....2465

2. Respondent's Claimed Method of Printing, and Not Printing, Scale Tickets.....2465

3. Printing Scale Tickets that Included "Shrink" Would Have Been Such an Outrageous Violation of Law that Respondent's Claim that He Did So Is Not Believable.....2470

4. Failing to Print All Scale Tickets Required to Support Invoice Weights Would Have Been Such an Outrageous Violation of Law that Respondent's Claim that He Did so Is Not Believable.....2481

D. Complainant's Investigation Was Not Faulty.....2485

VIII. Adverse Inference Is Drawn Against Respondent for Not Calling Yardman Who Allegedly Weighed the Livestock on Arrival in Pittsfield.....2487

IX. No Adverse Inference Is Drawn Against Complainant for Not Calling Kostelecky as a Witness Since He Played Only a Minor Role in the Investigation. Gentry's Testimony as to the Investigation Is Not Hearsay. Adverse Inference Is Drawn Against Respondent for Not Giving Worksheets to the Investigators. Respondent's Deceptive Briefs Exposed. Respondent Failed to Give Investigators Scale Tickets for Transactions 1-7, and 9 Because They Would Have Prompted Investigators to Ask for Nonexistent Worksheets 2489

A. All of Gentry's Testimony as to the Investigation Was Based on Personal Knowledge—Not Hearsay. Complainant's Investigators Requested All of Respondent's Records on January 29, 1979. No Worksheets Were Furnished, and the Scale Tickets for Transactions 1-7, and 9 Were Not Furnished 2490

B. Mrs. Manson Admits that All Scale Tickets Were Requested, and Claims She Furnished Them and the Worksheets to the Investigators. Her Admission Is Accepted, Her Claim Is Rejected, and No Adverse Inference Is Drawn Because of the Failure of Kostelecky to Testify 2508

C. I Infer that the Scale Tickets of Transactions 1-7, and 9 Were Not Furnished to the Department's Investigators Because They Would Have Prompted the Investigators to Ask for Nonexistent Worksheets. The Scale Tickets that Were Furnished (for Transactions 10-14), All Made After Kostelecky's Mid-October 1978 Visit to Respondent, Were "Sanitized" 2518

D. I Infer that the Worksheets Were Not Furnished on January 29, 1979, When Complainant's Investigators Requested All of Respondent's Records Because They Were Not Then in Existence 2535

X. The Trucker's Affidavit (Not Contradicted in His Testimony) Is Decisive for Complainant in Transaction 5, and the Trucker's Testimony Is Very Supportive of Complainant's Position in Transaction 4. No Truckers' Testimony Favors Respondent's Position. USDA Believes Every Word Said by Every Trucker (Taken in Context) 2538

XI. Only One Farmer's Testimony Supports Respondent's Claim (in Two Transactions) that Livestock Involved in Any of the 13 Alleged Reweighing Transactions Was Sorted or Substituted. His Testimony as to a Salient Fact Is Contradicted by Respondent, Respondent's Bookkeeper and Documentary Evidence 2540

XII. Additional Circumstances Common to Most Transactions that Are Links in the Total Factual Situation Leading to the Inference that Respondent Fabricated All the Worksheets and Scale Tickets in Transactions 1-14 to Cover Up His Weight Padding 2549

A. The Increases in Respondent's Sale Weights Over His Purchase Weights for the Identical Number and Type of Animals Purchased a Day or Two Before All Fit Into a Neat Formula, Exactly 2% or Exactly 3% Over His Purchase Weights in 7 of the 14 Transactions, Which Is Highly Significant Under the Laws of Statistical Probability..... 2549

B. In Addition to Buying Livestock for His Inventory, Respondent Buys Particular Loads of Livestock to Fill Particular Orders of Customers, Giving Him the Opportunity to Pad Weights..... 2554

C. Respondent (i) Frequently Sorts Livestock at Pittsfield Purchased for a Particular Customer, and (ii) Frequently Purchases Livestock for a Particular Customer Without Sorting. This Presented the Opportunity for Fraud, Without Arousing Suspicion..... 2565

D. Respondent's Bookkeeper Wrote the Cost of the Particular Lots Purchased for Customers on the Bottom of Respondent's Carbon Copy of the Invoices to Customers. This Entry Was of No Value to Respondent, under Respondent's Contention. I Infer It Was Done to Show Respondent's Exact Gross Profit on the Transactions..... 2567

E. The Number of Animals Allegedly Added from Respondent's Inventory Exactly Equaled the Number Allegedly Sorted Out, Even Though Some Customers Bought in Approximate Amounts..... 2582

F. The Worksheets Were Allegedly Prepared by Respondent at the Time of Each Transaction, and Contemporaneously Recorded the Activities as They Occurred. Respondent Then Allegedly Gave the Worksheets to His Bookkeeper for Preparing the Invoices to the Customers..... 2583

G. The Cumulative Effect of Suspicious and Unexplainable Circumstances..... 2584

H. The ALJ, Who Saw and Heard the Witnesses Testify, Did Not Believe the Testimony of Respondent or Mrs. Manson, in Part, Because of Their Demeanor at the Hearing..... 2585

XIII. In Transaction 7, 13 Circumstances Lead Me to Infer that the 69 Steers Sold to Bill Meyer, Hull, Illinois, on September 29, 1978, Were the Same 69 Steers Purchased by Respondent in Kansas City the Day Before, to Which He Added Exactly 3% by Pencil to the Purchase Weight, and that Respondent's Worksheet (Attributing the Weight Increase to the Substitution of Six Steers at Pittsfield) and Scale Ticket Were Fabricated to Cover Up His Fraud. Respondent Made a Net Profit of $888.24, Which Is $772.86 More than the Profit a Legitimate Order Buyer Would Have Made, and Respondent Could Have Undercut a Legitimate Order Buyer by 25¢ Per Cwt..... 2587

XIV. In Transaction 3, 10 Circumstances Lead Me to Infer that the 115 Heifers Sold to Graf Cattle Company, Dixon, Illinois, on September 29, 1978, Were the Same 115 Heifers Purchased by Respondent the Day Before, to Which Respondent Added Exactly 3 Pounds Per Head, and that Respondent's Worksheet (Attributing the Increase to the Substitution of Seven Heifers at Pittsfield) and Scale Ticket Were Fabricated to Cover Up His Fraud. Respondent Cheated Graf Out of $219.39 by the Weight Padding 2592

XV. In Transaction 9, 10 Circumstances Lead Me to Infer that the 84 Steers Sold to Jerry Langdon, Jacksonville, Illinois, on October 13, 1978, Were the Same 84 Steers Purchased by Respondent in Kansas City the Day Before, to Which He Added 20 Pounds Per Head to the Average Per-Head Purchase Weight, and that Respondent's Worksheet (Attributing the Increase to Sorting Two Lots Accidentally Mixed) and Scale Ticket Were Fabricated to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,256.92 Enabled Him to Undercut a Legitimate Order Buyer by $3.22 Per Cwt, and Still Make $46.18 More than a Legitimate Order Buyer Would Have Made 2594

XVI. In Transaction 1, 12 Circumstances Lead Me to Infer that the 77 Steers Sold to Carroll Long, Pleasant Hill, Illinois, on August 11, 1978, Were the Same 77 Steers Purchased by Respondent in Kansas City the Day Before, to Which Respondent Added .5% by Pencil to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Two Head at Pittsfield) and Scale Ticket to Cover Up His Fraud. Respondent Cheated Long Out of $147.73 by Padding the Weight 2595

XVII. In Transactions 13, 10 and 11, Respondent's Carbon Copy of the Invoices Sent to Customers is Dated 1 to 4 Days After the Date on the Customer's Original Invoice. I Infer that Respondent Got Behind in Fabricating Scale Tickets, and Had Mrs. Manson Completely Rewrite the Invoices in Longhand, Changing Only the Dates, so that the Invoice Dates on Respondent's Carbon Copies Would Coincide with the Dates on the Scale Tickets (Scale Tickets Are Purchased Prenumbered and Must Be Used in Proper Sequence, but Invoice Numbers Are Merely Typed by Mrs. Manson) 2596

A. In Transaction 13, 12 Circumstances Lead Me to Infer that the 128 Steers Sold to Gordon Jones, Kirkland, Illinois, on November 28, 1978, Were the 117 Steers Purchased by Respondent the Day Before from Farmers & Traders Commission Company, Palmyra, Missouri, and 11 Steers Purchased at the Same Time from Palmyra Livestock Auction Market, to Which Respondent Added Exactly 3% by Pencil to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Use of 11 Head from Inventory Instead of the 11 Head Purchased at Palmyra) and Scale Tickets to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,814.35 Enabled Respondent to Undercut a Legitimate Order Buyer by $1.02 Per Cwt, and Still Make $880.23 More than a Legitimate Order Buyer Would Have Made 2598

1. On November 27, 1978, Respondent Purchased 117 Steers from Farmers & Traders Commission Co., Palmyra, Missouri, and 11 Steers from Palmyra Livestock Auction Market, for a Total of 128 Steers Weighing 92,375 Pounds, and Costing $60,742.59. Respondent Invoiced Gordon Jones, Kirkland, Illinois, the Next Day for 128 Steers Weighing 95,145 Pounds (Exactly 3% More than Respondent's Purchase Weight) 2598

2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Jones in Longhand, Changing Only the Date from November 28, 1978, to November 30, 1978, so that the Invoice Would Coincide with the Scale Tickets Fabricated after the Fact 2604

3. Mrs. Manson's "Estimate" of the "Raw Cost" of the 128 Steers in Transaction 13, Which She Wrote on Respondent's Postdated Carbon Copy of the Invoice to Jones, Is $60,742.59, the Exact Price Respondent Paid for the 117 and 11 Steers Purchased in Palmyra, Missouri. (According to Respondent's Worksheet, the 11 Steers Were Irrelevant to the Jones Transaction) 2608

4. Twelve Circumstances Lead me to Infer that Respondent Added Exactly 3% by Pencil to the Purchase Weight of the 128 Steers Purchased in Palmyra, Missouri, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud 2610

5. Respondent's Weight-Padding Profit of $1,814.35 Enabled Him to Undercut a Legitimate Order Buyer by $1.02 Per Cwt, and Still Make $880.23 More than a Legitimate Order Buyer Would Have Made 2611

B. In Transaction 10, 12 Circumstances Lead Me to Infer that the 63 Steers Sold to Bob Russell, Somonauk, Illinois, on October 26, 1978, Were the 63 Steers Purchased by Respondent the Same Day as Kansas City Lot No. 66, to Which Respondent Added 5 Pounds Per Head to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Five Head at Pittsfield) and Scale Tickets to Cover Up His Fraud. Respondent Cheated Russell Out of $203.81 by Padding the Weight 2612

1. On October 26, 1978, Respondent Purchased 63 Steers Weighing 44,905 Pounds as Kansas City Lot No. 66. Respondent Invoiced Bob Russell, Somonauk, Illinois, the Same Day for 63 Steers Weighing 45,220 Pounds, an Increase of 315 Pounds, or 5 Pounds Per Head 2613

2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Russell in Longhand, Changing Only the Date from October 26, 1978, to October 30, 1978, so that the Invoice Would Coincide with the Scale Tickets (Fabricated after the Fact) 2617

3. Twelve Circumstances Lead Me to Infer that Respondent Added 5 Pounds Per Head to the Purchase Weight of the 63 Steers Purchased the Same Day as Kansas City Lot No. 66, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud 2618

4. Respondent Cheated Russell Out of $203.81 by Padding the Weight 2626

C. In Transaction 11, 12 Circumstances Lead Me to Infer that the 79 Steers Sold to Rodhouse Bros., Pleasant Hill, Illinois, on November 6, 1978, Were the 79 Steers Purchased by Respondent's Agent Two Days Before, to Which Respondent Added 35 Pounds Per Head to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of 26 Head at Pittsfield) and Scale Tickets to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,741.95 Enabled Him to Undercut a Legitimate Order Buyer by $2.23 Per Cwt, and Still Make $679.95 More than a Legitimate Order Buyer Would Have Made 2627

1. On November 4, 1978, Respondent's Agent Purchased 79 Steers Weighing 47,670 Pounds. Respondent Invoiced Rodhouse Bros., Pleasant Hill, Illinois, Two Days Later for 79 Steers Weighing 50,435 Pounds, an Increase of 2,765 Pounds, or 35 Pounds Per Head 2627

2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Rodhouse Bros., in Longhand, Changing Only the Date from November 6, 1978, to November 7, 1978, so that the Invoice Would Coincide with the Scale Tickets (Fabricated after the Fact) 2631

3. Twelve Circumstances Lead me to Infer that Respondent Add 35 Pounds Per Head to the Purchase Weight of the 79 Steers Pu chased 2 Days Before, and Fabricated the Worksheet and Sca Tickets to Cover Up His Fraud.....

4. Respondent's Weight-Padding Profit of $1,711.95 Enabled Him t Undercut a Legitimate Order Buyer by $3.23 Per Cwt. and Sti Make $679.95 More than a Legitimate Order Buyer Would Hav Made.....

XVIII. In Transaction 12, Eight Circumstances Lead Me to Infer that the 2 Steers Sold to Rodhouse Bros., Pleasant Hill, Illinois, on November 18 1978, Were the Same 21 Steers Purchased by Respondent in Kansa City 2 Days Before, to Which He Added 20 Pounds Per Head to th Average Per-Head Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Thre Head at Pittsfield) and Scale Ticket to Cover Up His Fraud. Respond ent's Weight-Padding Profit of $278.86 Enabled Him to Undercut a Le gitimate Order Buyer by $1.77 Per Cwt. and Still Make $51.41 More than a Legitimate Order Buyer Would Have Made.....

XIX. The 8-Month Suspension Order and $10,000 Civil Penalty Imposed in This Case Are Much Too Lenient for Respondent's Willful, Flagrant and Repeated Violations.....

A. Respondent's Willful, Flagrant and Repeated Violations Warrant a 5-Year Suspension Order.....

B. USDA's Sanction Policy.....

C. The $10,000 Civil Penalty Imposed in This Case Is Much Too Le nient.....

D. Affirmative Action Cease and Desist Orders Should Be Issued in Future Cases of This Nature.....

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PRELIMINARY STATEMENT

A. Prelude.

This proceeding under the Packers and Stockyards Act,[1] originally reported at 41 Agric. Dec. 2187 (1982), is here on remand from the United States Court of Appeals for the Seventh Circuit because we failed to explain adequately the reasons for finding respondent in violation of the Act. *Saylor* v. *USDA,* 723 F.2d 581 (7th Cir. 1983). The criticism was well justified. We appreciate this second chance.

This is not a close case. The proof here is beyond the shadow of a reasonable doubt.[2] The case has been made to appear to be close (or perhaps hopeless) only because no one has taken the enormous amount of time required to set forth the conclusive evidence against respondent, which is buried in the exhibits, and, also, in judicial terminology,[3] respondent's attorney has "played fast and loose with [the] facts." The original decision in the case states (41 Agric. Dec. at 2191):

> The evidence clearly and strongly supports the Complainant's contentions. The documentary evidence and actual payments clearly show that the cattle were *directly shipped* from the point of purchase to the point of destination in most of these transactions, contrary to Respondent's contentions.
>
> Scale tickets and worksheets produced by Respondent at the time of trial had not been provided to P&SA auditors. Even then, these delinquently produced documents contained internal conflicts and inconsistencies and show signs that they were fabricated subsequent to the events themselves.

I give *insignificant* weight to the "direct" shipment evidence except in Transaction 5, where the trucker's affidavit states that

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[1] *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law,* ch. 3, at 182-320 (1981 and Aug. 1984 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law,* ch. 71 (1980).

[2] However, complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston,* 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC,* 450 U.S. 91, 92-104 (1981); *In re Rowland,* 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd,* 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.,* 37 Agric. Dec. 1336, 1346 (1978), *aff'd,* No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.,* 614 F.2d 770 (3d Cir. 1980).

[3] *Brucar* v. *Rubin,* 638 F.2d 987, 990 n.3 (7th Cir. 1980) (*per curiam*).

A. In Transaction 13, 12 Circumstances Lead Me to Infer that the 128 Steers Sold to Gordon Jones, Kirkland, Illinois, on November 28, 1978, Were the 117 Steers Purchased by Respondent the Day Before from Farmers & Traders Commission Company, Palmyra, Missouri, and 11 Steers Purchased at the Same Time from Palmyra Livestock Auction Market, to Which Respondent Added Exactly 3% by Pencil to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Use of 11 Head from Inventory Instead of the 11 Head Purchased at Palmyra) and Scale Tickets to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,814.35 Enabled Respondent to Undercut a Legitimate Order Buyer by $1.02 Per Cwt, and Still Make $880.23 More than a Legitimate Order Buyer Would Have Made 2598

1. On November 27, 1978, Respondent Purchased 117 Steers from Farmers & Traders Commission Co., Palmyra, Missouri, and 11 Steers from Palmyra Livestock Auction Market, for a Total of 128 Steers Weighing 92,375 Pounds, and Costing $60,742.59. Respondent Invoiced Gordon Jones, Kirkland, Illinois, the Next Day for 128 Steers Weighing 95,145 Pounds (Exactly 3% More than Respondent's Purchase Weight) 2598

2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Jones in Longhand, Changing Only the Date from November 28, 1978, to November 30, 1978, so that the Invoice Would Coincide with the Scale Tickets Fabricated after the Fact 2604

3. Mrs. Manson's "Estimate" of the "Raw Cost" of the 128 Steers in Transaction 13, Which She Wrote on Respondent's Postdated Carbon Copy of the Invoice to Jones, Is $60,742.59, the Exact Price Respondent Paid for the 117 and 11 Steers Purchased in Palmyra, Missouri. (According to Respondent's Worksheet, the 11 Steers Were Irrelevant to the Jones Transaction) 2608

4. Twelve Circumstances Lead me to Infer that Respondent Added Exactly 3% by Pencil to the Purchase Weight of the 128 Steers Purchased in Palmyra, Missouri, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud 2610

5. Respondent's Weight-Padding Profit of $1,814.35 Enabled Him to Undercut a Legitimate Order Buyer by $1.02 Per Cwt, and Still Make $880.23 More than a Legitimate Order Buyer Would Have Made 2611

B. In Transaction 10, 12 Circumstances Lead Me to Infer that the 63 Steers Sold to Bob Russell, Somonauk, Illinois, on October 26, 1978, Were the 63 Steers Purchased by Respondent the Same Day as Kansas City Lot No. 66, to Which Respondent Added 5 Pounds Per Head to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Five Head at Pittsfield) and Scale Tickets to Cover Up His Fraud. Respondent Cheated Russell Out of $203.81 by Padding the Weight 2612

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4. Respondent Cheated Russell Out of $263.81 by Padding the Weight 2626

C. In Transaction 11, 12 Circumstances Lead Me to Infer that the 79 Steers Sold to Rodhouse Bros., Pleasant Hill, Illinois, on November 6, 1978, Were the 79 Steers Purchased by Respondent's Agent Two Days Before, to Which Respondent Added 35 Pounds Per Head to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of 26 Head at Pittsfield) and Scale Tickets to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,741.95 Enabled Him to Undercut a Legitimate Order Buyer by $2.23 Per Cwt, and Still Make $679.95 More than a Legitimate Order Buyer Would Have Made 2627

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3. Twelve Circumstances Lead me to Infer that Respondent Added 35 Pounds Per Head to the Purchase Weight of the 79 Steers Purchased 2 Days Before, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud 2633

4. Respondent's Weight-Padding Profit of $1,741.95 Enabled Him to Undercut a Legitimate Order Buyer by $2.23 Per Cwt, and Still Make $679.95 More than a Legitimate Order Buyer Would Have Made 2633

XVIII. In Transaction 12, Eight Circumstances Lead Me to Infer that the 21 Steers Sold to Rodhouse Bros., Pleasant Hill, Illinois, on November 18, 1978, Were the Same 21 Steers Purchased by Respondent in Kansas City 2 Days Before, to Which He Added 20 Pounds Per Head to the Average Per-Head Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Three Head at Pittsfield) and Scale Ticket to Cover Up His Fraud. Respondent's Weight-Padding Profit of $278.86 Enabled Him to Undercut a Legitimate Order Buyer by $1.77 Per Cwt, and Still Make $51.44 More than a Legitimate Order Buyer Would Have Made 2634

XIX. The 8-Month Suspension Order and $10,000 Civil Penalty Imposed in This Case Are Much Too Lenient for Respondent's Wilful, Flagrant and Repeated Violations 2636

A. Respondent's Wilful, Flagrant and Repeated Violations Warrant a 5-Year Suspension Order 2636

B. USDA's Sanction Policy 2644

C. The $10,000 Civil Penalty Imposed in This Case Is Much Too Lenient 2660

D. Affirmative Action Cease and Desist Orders Should Be Issued in Future Cases of This Nature 2664

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Appendix 2666

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[1] *See generally* Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3, at 182-320 (1981 and Aug. 1984 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

[2] However, complainant need only prevail by a preponderance of the evidence. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman* v. *SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[3] *Bruear* v. *Rubin*, 638 F.2d 987, 990 n.3 (7th Cir. 1980) (*per curiam*).

he "hauled 43 steers from the stockyards at Kansas City, Missouri, to Mr. Gentry's farm about (3) three miles outside of Hannibal, Missouri," and that the "43 steers went straight through and were not unloaded until I made delivery at Mr. Gentry's [the customer's] farm near Hannibal, Missouri" (CX 18, p. 4). I give *decisive* weight to the "internal conflicts and inconsistencies," proving that respondent's worksheets and scale tickets were fabricated to cover up respondent's weight padding (irrespective of whether the livestock stopped at respondent's facilities in Pittsfield, Illinois, enroute to the customer).

Even as to Transaction 5, the "direct" shipment evidence is not decisive. That is, since the trucker's affidavit states categorically that the 43 steers *were not unloaded* between Kansas City and Mr. Gentry's farm outside of Hannibal, Missouri, it makes no difference whether the truck driver drove from Kansas City to Pittsfield, Illinois, and then backhauled the 43 steers to Hannibal, Missouri. Hence there is no transaction where the "direct" shipment evidence is of any importance in this case.

As to respondent's briefs, the briefs filed since Mr. Eftink replaced Mr. Schimmel (after the original decision was filed in this case) have been the most deceptive briefs I have seen in my 35 years with the Department.

On February 1, 1985, after further briefs were filed on remand, Administrative Law Judge William J. Weber (ALJ) issued a Decision and Order on Remand setting forth many additional reasons why he found that respondent violated the Act and regulations. On February 25, 1985, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 CFR § 2.35).[4]

Ordinarily, I would have adopted the ALJ's Decision and Order on Remand as the final decision in this case (with several trivial changes). But in view of respondent's attorney's deceptive briefs, and the court's remand decision (723 F.2d at 584)—

> In addition to the problems we have noted, there may be several other USDA conclusions for which there appears

[4] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program (December 1962–January 1971)).

> to be inadequate support. We are concerned about the lack of a clear statement of reasons—especially in light of the severe penalties imposed by the USDA.
>
> . . . The USDA is required to give "an adequate explanation of the connection between the record before it and the choice it makes." . . . Hence, we admonish the USDA to carefully examine the record in this case and to give clear and cogent reasons for whatever result it reaches on remand.

—I believe that a more detailed, transaction-by-transaction discussion is required.

Respondent contends that in 13 of the 14 transactions involved here (all except Transaction 8), the livestock purchased for particular customers was brought to respondent's facilities at Pittsfield, Illinois, where some animals were removed and others were added, or various sorting or mixing activities occurred (referred to herein as the alleged reweighing transactions). Complainant contends, and the ALJ and I have concluded, that in these 13 alleged reweighing transactions, no animals were removed, none were added, no sorting or mixing occurred, and no animals were on the scale when respondent printed the scale tickets (irrespective of whether the truck actually stopped at Pittsfield enroute to the buyer). We have found and concluded that respondent arbitrarily added weight by pencil (*e.g., exactly* 2% or 3% of the purchase weight in 7 of the 13 alleged reweighing transactions) when he invoiced the buyers in these transactions.

In Transaction 8, respondent admits that the livestock never came to Pittsfield (geography would have made such a claim absurd, since the customer's feedlot was at Emporia, Kansas, *west* of the Kansas City and Huntsville, Missouri, purchase points), but contends that the increased weight resulted from his error in computing pencil shrink. (This is the only transaction that involves pencil shrink, see, § VII(B), *infra.*) Complainant contends, and the ALJ and I have concluded, that the increased weight in Transaction 8 also resulted from respondent's arbitrary padding of the invoice weight.

Complainant contends, and the ALJ and I have concluded, that respondent fabricated scale tickets (without any livestock being on the scale) and worksheets to substantiate his weight fraud. In reaching this conclusion, which is, of course, an inference, I have relied upon 173 circumstances in the 14 transactions. Fortunately, however, 12 of the circumstances are repeated in most of the 13 al-

leged reweighing transactions, so 12 circumstances account for of the 173 relied upon.

Two of the 12 circumstances relied upon in a number of transactions are innocuous, when viewed in isolation, but are portant links in the total chain of circumstances proving resp ent's fraud.

The weightiest circumstances are set forth in the discussio the individual transactions. That is where we find the "smo guns," such as—

1. In Transaction 4, where the weight of 55 steers invoice Graf is exactly 3% greater than the weight of 55 steers purch the day before by respondent in Kansas City as Lot No. 66, bu spondent's worksheet shows that the 55 steers sold to Graf v comprised of steers from two other lots purchased at the same t as Lot No. 66, *viz.*, Lot No. 69 (consisting of 22 steers weigl 19,160 pounds) and 33 steers from a total of 94 purchased as No. 62X, and respondent's worksheet shows the Pittsfield "arriv weight of *all 94* steers in Lot No. 62X, and shows that after 33 w used for Graf, the other 61 went to Pen 6 of respondent's invent documentary evidence from respondent's files shows, *inter a* that (i) 30 of the 94 steers in Lot No. 62X never came to Pittsfi but were shipped directly from Kansas City to the Swift Feed Y in Omaha, Nebraska, and (ii) respondent sold all 22 steers in No. 69 to someone else on the same day as the Graf transaction, part of a shipment of 37 steers (*i.e.*, respondent's invoice to other customer shows three lots, totalling 37 head, including "] 22 #69 19160" (CX 20, p. 1));

2. In Transaction 14, in which respondent claims to ha sorted 121 heifers out of 180 heifers purchased from Woodson Li stock Auction the day before, respondent's documentary eviden shows that he only bought 121 heifers from Woodson—not 180— the 121 heifers sent to the customer at an increase in weight of ctly 2% were the identical heifers bought from Woodson (I adding machine tapes show why he mistakenly thought, when was concocting his defense months after the transaction, that had bought 180 heifers);

3. In Transaction 5, where the weight invoiced to Gentry for steers is exacty 2% greater than the weight of 43 steers purchase by respondent the day before in Kansas City, an affidavit by th trucker, made while the event was still fresh in mind, states th he "hauled 43 steers from the stockyards at Kansas City, Missour to Mr. Gentry's farm about (3) three miles outside of Hannibal Missouri," and that "[t]hese 43 steers went straight through an were not unloaded until I made delivery at Mr. Gentry's farm nea

Hannibal, Missouri" (his testimony 3 years and 3 months after the fact, when he was then a full-time employee of respondent, when read in the light of its context, does not in any manner undercut his affidavit);

4. In Transactions 2 and 6, respondent's agent Ed Van Ee purchased 67 steers and 87 steers for respondent's customers Long and Adams, respectively, at Springfield, Missouri, on September 13, 1978, *and respondent's invoices to Long and Adams on the next day or two are both for weights exactly 2% more than respondent's purchase weights*, allegedly as a result of substituting 13 steers at Pittsfield in Transaction 2 and 12 steers at Pittsfield in Transaction 6, which would happen by chance 1 time in 41,152; furthermore, in Transaction 6, (i) there is a fatal variance between the worksheet (which shows 300 pounds of prorated shrink added to 12 head) and scale ticket (which shows 400 pounds of prorated shrink added to 16 head), (ii) Mrs. Manson, respondent's bookkeeper, could not explain why the worksheet showed prorated shrink on only 16 head, when 75 head allegedly had shrunk, and (iii) the explanation by respondent for the 400 pounds of shrink is shown to be perjury, totally inconsistent with the mathematics of the worksheet; and

5. In Transaction 8, the mathematics on the worksheet and other circumstances are not consistent with respondent's explanation that a mistake was made in computing the pencil shrink.

Whether the livestock in the alleged reweighing transactions actually stopped at respondent's facilities in Pittsfield, Illinois, enroute to the customer is of no importance in any of the transactions involved here because, even if it did, overwhelming documentary and circumstantial evidence proves that no animals were substituted, and no mixing occurred.[5] Complainant concedes on remand (a concession not previously made) that the livestock went through Pittsfield in Transactions 6, 9, 11, 13, and 14 (Complainant's Opening Brief on Remand at 8).[6]

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[5] To quantify my views, on a scale of 1 to 100, with 51 needed for complainant to prevail, I would score complainant's proof in this case at 99.999999, about one point of which is based on trip sheets or check stubs relating to respondent's payments to truckers; *i.e.*, I would score complainant's proof at 99 if the record contained no trip sheets or check stubs relating to payments to truckers.

[6] Complainant's brief originally included Transaction 12 in this category, but "Cx. 11," which relates to Transaction 12, was deleted by complainant's errata filed April 30, 1984. (However, it is certain that the livestock stopped at Pittsfield in Transaction 12 since one trucking company hauled the livestock from Kansas City to Pittsfield, and a second trucking company hauled the livestock from Pittsfield to the customer.)

In drawing the inference that respondent added arbit amounts to the weights billed to customers in the 14 transac involved here, and fabricated scale tickets and worksheets i elaborate Watergate-style cover-up, here as in *In re Mattes stock Auction Market, Inc.*, 42 Agric. Dec. 81, 97, *aff'd*, 721 1125 (7th Cir. 1983), "I have not relied on any single factor co ered in isolation, but, rather, on the totality of all of the rele facts and circumstances, considered as a whole."

It is well settled that a violation may be proven solely from cumstantial evidence, irrespective of the existence of theoret innocent explanations. For example, in *In re Gold Bell-R&S Je Farms, Inc.*, 37 Agric. Dec. 1336 (1978), *aff'd*, No. 78-3134 (D. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980), I withd shell egg grading services from a firm for 18 months based on cumstantial evidence that the firm deliberately switched small after larger eggs had been graded by USDA, in sales to a Un States Military Defense Personnel Support Center. Respond argued (37 Agric. Dec. at 1361) that the—

> "discrepancy [between the weight and quality of the eggs at respondent's plant and at destination] could have been caused by the willful act or deceptions on the part of the [USDA] relief graders to discredit the Respondent by deliberately switching cases for the benefit of unknown conspirators," or by a "conspiracy by the military to discredit Goldbell and thereby earn promotion by military personnel for good work on conviction and to cover up possible weaknesses of military supervision. Once again this sounds ridiculous and farfetched and yet in so far as the Respondent is concerned, no more so than the Complainant's theory of guilt, no more farfetched than the 'Watergate' situation."

My response to that argument, sustained by two reviewi courts, was as follows (*id.*):

> However, in view of the presumption of regularity supporting the acts of public officials,[22] such fanciful theories

[22] See *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15; *Lawson Mi Company* v. *Freeman*, 358 F.2d 647, 649 (C.A. 6); *Barnard and Burk* v. *City of Pala ki*, 327 F.2d 911, 912 (C.A. 6); *Donaldson* v. *United States*, 264 F.2d 804, 807 (C.A. 1 *Reines* v. *Woods*, 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board* *Bibb Mfg. Co.*, 188 F.2d 825, 827 (C.A. 5); *Woods* v. *Tate*, 171 F.2d 511, 513 (C.A. 1 *Pasadena Research Laboratories* v. *United States*, 169 F.2d 375, 381 (C.A. 9), certiora ri denied, 335 U.S. 853; *Laughlin* v. *Cummings*, 105 F.2d 71, 73 (C.A. D.C.).

> not based on a shred of evidence are not sufficient to overcome the massive evidence giving rise to the inference that respondent's employees deliberately switched the eggs involved here.

However, in the present case, there is enough direct evidence to sustain the sanction imposed here without reliance on *any* circumstantial evidence. That is, the sanction for false weighing or padding weights does not depend on the number of proven violations. The only reason for proving more than one violation is to be sure that the false weighing or weight padding was deliberate, rather than accidental (see § XIX, *infra*). Here, several of the violations are proven conclusively by direct evidence, mostly documentary.

B. Transaction Numbers and Related Exhibits Identified. Vital Importance of Distinguishing Between Respondent's Carbon Copy of His Invoice to the Buyer and the Buyer's Original Copy of the Same Invoice (Because of Respondent's Attorney's Deceptive Briefs).

The transaction numbers used in this decision and in most of the briefs follow the order in which the transactions are listed in paragraph II of the complaint. Transactions 10–14, from October 26 to December 2, 1978, are in chronological order, but Transactions 1–9, from August 10 to October 13, 1978, are not in chronological order. Paragraph II of the complaint is as follows:

II

> Respondent, on or about the dates and in the transactions set forth below and in divers other transactions, purchased cattle for and sold cattle to certain customers, purportedly on the basis of the same weights at which respondent purchased the cattle, but in fact respondent billed and collected from such customers on the basis of false and incorrect weights obtained by adding an arbitrary number of pounds to the weights at which the cattle were originally purchased. Copies of the invoices and other documents showing such false weights were made a part of the accounts and records of respondent.

Transaction No.*	Invoice Purchase Date	No. Head of Cattle	Purchase Weights (lbs.)	Invoice Weights to Customers (lbs.)	Added Weights (lbs.)	Invoice Sale Date	Customer
1	8/10/78	77	46,285	46,515	230	8/11/78	Carroll Long
2	9/13/78	67	42,150	42,995	845	9/15/78	Carroll Long
3	9/27–28/78	115	45,365	45,710	345	9/29/78	Graf Cattle Co.
4	10/5/78	55	45,350	46,710	1,360	10/6/78	Graf Cattle Co.
5	8/31/78	43	26,730	27,265	535	9/1/78	M.H. Gentry
6	9/13/78	87	43,770	44,645	875	9/14/78	Don Adams
7	9/28/78	69	46,150	47,535	1,385	9/29/78	William F. Meyer
8	10/12–13/78	189	130,912	131,492	580	10/13/78	Roger Jennings
9	10/12/78	84	37,680	39,395	1,715	10/13/78	Jerry Langdon
10	10/26/78	63	44,905	45,220	315	10/26/78	Bob Russell
11	11/4/78	79	47,670	50,435	2,765	11/6/78	Rodhouse Bros.
12	11/16/78	21	12,850	13,280	430	11/18/78	Rodhouse Bros.
13	11/27/78	128	92,375	95,145	2,770	11/30/78	Gordon Jones
14	12/1/78	121	54,030	55,110	1,080	12/2/78	Lee L. Lowder, Jr.

*This column added by the Judicial Officer; column showing "Insurance Billed to Customer" omitted.

Respondent's exhibits for each transaction have a cover sheet showing the transaction number in the upper left-hand corner. The transaction numbers on respondent's cover sheets follow the same order in which the transactions are listed in paragraph II of the complaint.

Similarly, complainant's exhibits correspond to the order of the transactions in paragraph II of the complaint (*e.g.*, the 15 pages of CX 6 all relate to Transaction 6), with two exceptions. Unfortunately, CX 11 relates to Transaction 12, and CX 12 relates to Transaction 11. Because of this confusion, some of respondent's briefs are not consistent with his exhibit descriptions as to which transaction is Transaction 11 and which is Transaction 12. As used herein, Transaction 11 (CX 12) involves the sale of 79 steers to Rodhouse Bros., and Transaction 12 (CX 11) involves the sale of 21 steers to Rodhouse Bros.

At the outset, it is vital for the court to know that respondent's invoice forms used to invoice the buyers (his customers) are chemically treated (or, less likely, have carbon paper inserts) so that the buyer's copy (the original) and respondent's copy (the carbon copy) are created at the same time, and are identical except for information later added by either party. This is readily apparent if respondent's actual carbon copies of the invoices, pulled from respondent's records and received in evidence, are examined. (If necessary, arrangements can be made to have the Hearing Clerk's original file made available to the court.) The actual carbon copies of the invoices are included in respondent's exhibits for each transaction (RXs 4, 8, 22, 28, 33, 36, 40, 44, 51, 56, 62, 66, 73, 80). What information was originally on these exhibits can easily be seen by its carbon appearance, and what information was later added by respondent's bookkeeper can easily be seen because it is in pencil.

Complainant's exhibits include two copies of respondent's invoices to the buyers in these 14 transactions (except for Transaction 8). *The first page* of each of complainant's Exhibits 1–14 is a photocopy of the invoice to the buyer made by Mr. Gentry and Mr. Kostelecky, complainant's investigators, on January 29, 1979 (or the following few days), *from respondent's records. The second page* of each of these exhibits is a copy of the invoice for the same transaction made by complainant's investigators *from the buyers' records*, except that the buyers' copy appears at page 3 of CX 13 and 14,[7] and no buyer's copy was obtained in CX 8 (Tr. 8–20).

[7] In Transaction 14, the buyer's copy was from the buyer's "records at Kansas City," and was "sent to us from a different source to, through the Kansas City office" (Tr. 16–17).

For example, the invoice in Transaction 2 photocopied from the buyer's records is reproduced on the next page (CX 2, p. 2), and the same invoice photocopied from respondent's records is reproduced on the following page (CX 2, p. 1).

Transaction 2 Invoice Copied From Buyer's Records (CX 2, p. 2)

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

DATE Sept 15 19 78

SOLD TO Carroll Lang
Pleasant Hill Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT	
67	Stw	42995	66.05	28,388	20
	Live Wt 642#		Ins.	42	60
				28,440	80
	Truck - Mrl				

#2788

Signed

WE APPRECIATE YOUR PATRONAGE

Transaction 2 Invoice Copied From Respondent's Records (CX 2, p. 1)

GEORGE L. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 235-6186
(217) 285-4011

DATE Sept 15 19 28

SOLD TO [illegible] Long
[illegible] Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT
[illegible]	Spring	42995	65.05	[illegible] 20
	[illegible] 642#		[illegible]	42 00
				28,440 30
		Pd Ck #5023		
	Truck	777.80		

#2788 ←

Signed

27,206 21 WE APPRECIATE YOUR PATRONAGE

These copies have not been traced over, *i.e.,* "enhanced" for legibility. (In fact, none of the documents reproduced in this decision have been enhanced by the Judicial Officer for legibility.)

The buyer's copy and respondent's copy of this invoice, which are identical except for information later added by Mrs. Manson, respondent's bookkeeper, on his copy, are reproduced here to demonstrate that respondent generates both copies of the invoice simultaneously from treated paper, and to illustrate what respondent's attorney refers to as Mrs. Manson's "distinctive feminine handwriting" (Respondent's Brief on Remand, filed April 2, 1984, at 24). (Her "distinctive feminine handwriting" shows, *e.g.,* that Mrs. Manson wrote the origin and destination information on some of the trip sheets that respondent and she contend was written by truckers.)

Mrs. Manson testified as to "@2788" (JO Ref. 1, p. 15),[8] which is typed near the bottom of the left-hand corner of the invoice (Tr. 147):

> Q. Now, what is the figure above that, "2788"?
>
> A. That is our invoice number.

It is obvious from examining the documents that respondent's invoice forms are not purchased with preprinted numbers. Respondent's invoice number is merely typed on the invoice form. For example, in the invoice for Transaction 2, reproduced above, whoever typed the invoice number (presumably Mrs. Manson) at first mistakenly typed "@" instead of "#," preceding "2788." The "@" appears on the (upper case) number 2 key, and the "#" appears on the (upper case) number 3 key, on a standard typewriter keyboard. On Transaction 2, I infer that Mrs. Manson first hit the "@" key next to the "#" key, then backspaced and typed "#" over the "@." In all of the other transactions, the "#" appears as a clean "#".

Since respondent's copy and the buyer's copy of the invoices are prepared at the same time from chemically treated paper, the copies are identical in all but three of the transactions involved here, except for information later added by the parties. However, in Transactions 10, 11 and 13, Mrs. Manson, respondent's bookkeeper, completely rewrote respondent's copies in longhand, chang-

[8] Judicial Officer references to specific parts of exhibits consist of numbered arrows, which are numbered consecutively as they would be seen if reading a page, *i.e.,* beginning at the top left-hand corner of the exhibit and going across the page from left to right. Some data identified by numbered arrows are not discussed until later in the decision, but numbering them in sequence facilitates locating them.

ing only the dates (which are 1 to 4 days after the fact), and add respondent's invoice numbers and scale ticket numbers (in pen to her postdated carbon copies.[9] As to all of the transactions, court can ascertain what information was added in pencil by spondent's bookkeeper to his copy of the invoices by comparing buyer's copy with respondent's copy.

Respondent's proposed findings of fact on remand (which identical to those filed with the court) are intentionally deceptive and misleading as to the scale ticket numbers being written on invoices in Transactions 10–14. Using Transaction 10 as an illustration, respondent's attorney states (Brief filed April 2, 1984, at 17):

> Sixty-three (63) head were weighed at Pittsfield on Saylor's scale, and the weight was imprinted on serially numbered scale tickets (Rx. Ex. 54, App. 28). *The serial numbers from the scale tickets and the weight were written on the invoice which was prepared for his customer* (Cx. Ex. 10, Rx. Ex. 56). The cattle were then shipped from Pittsfield to Somonauk, Illinois, near DeKalb, Illinois, to Mr. Bob Russell (Cx. Ex. 10). [Emphasis added.]

Focusing on the second sentence, an accurate statement with respect to the serial numbers of the scale tickets is as follows:

> The serial numbers from the scale tickets were written in pencil on respondent's carbon copy of the invoice (RX 56; CX 10, p. 1), but the serial numbers from the scale tickets were not written on the original copy of the invoice, which was sent to the customer (CX 10, p. 2).[10]

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[9] Mrs. Manson claims that she ran out of numbered invoice forms in Transactions 10 and 13. If true, she obviously would have merely added the invoice numbers to her copies at a later date, instead of rewriting the entire documents in longhand, changing only the dates. (But she had to change the dates to be consistent with the preprinted, serially numbered scale tickets, which respondent neglected to fabricate in those three transactions until 1 to 4 days after the fact (see § XVII, *infra*).

[10] For the purposes of this discussion, I am omitting any reference to the "weight . . . written on the invoice." The weight printed on the scale tickets, which respondent admits was not the actual weight of the 63 animals at the time they were allegedly weighed on the respondent's scale, was, of course, the same as the weight "written on the invoice which was prepared for his customer." However, the first sentence quoted above is deceptively inaccurate since it implies that the 63 head were weighed in the normal, lawful manner, *i.e.*, with the weight imprinted on the scale ticket reflecting the actual weight of livestock on the scale. However, respondent concedes (or claims) that he printed scale tickets which included "shrink" (§ VII(C)(2), *infra*), which would have been such a blatant violation of law that his claim is not believable (§ VII(C)(3), *infra*).

Respondent then uses that deceptive statement of facts to argue that it would have been virtually impossible for respondent to have subsequently fabricated the scale tickets in these transactions. For example, respondent's brief filed with the court, which is similar to his briefs filed here (*e.g.*, Petition for Reconsideration at 4-5), is as follows (Brief for Petitioner at 25):

> The serially numbered scale tickets were in proper numerical order and showed no evidence of falsification. In four of the transactions [actually five, Transactions 10-14] the serial number was actually written on the sales invoice, as evidenced on photocopies made by the auditor [actually by Mr. Gentry and Mr. Kostelecky]. It would be virtually impossible for Saylor to have subsequently fabricated these scale tickets.

Since the serial numbers of the scale tickets were written only on respondent's carbon copies of the invoices in Transactions 10-14, and not on the original copies sent to the buyers, instead of it being "virtually impossible for Saylor to have subsequently fabricated these scale tickets," it would have been quite easy for Saylor to have subsequently fabricated the scale tickets.

In fact, Transaction 10 is one of the three transactions where respondent's bookkeeper completely rewrote his copy of the invoice in longhand, except that the date on the buyer's copy is October 26, 1978 (CX 10, p. 2), and the date on the respondent's copy is October 30, 1978, the same date as the scale tickets for that transaction (CX 10, p. 1). Hence respondent had 4 days within which to fabricate the scale tickets. Respondent's time for fabricating the scale tickets was limited only by the fact that the scale tickets, as distinguished from his invoices, are serially numbered before he purchases them from the printer, and must be used in proper order.

Complainant has always contended that the scale tickets were fabricated on the same day that the invoices were prepared, except in Transactions 10, 11, and 13, in which the scale tickets were fabricated from 1 to 4 days after the fact. It is the worksheets—not the scale tickets—that complainant, the ALJ and the Judicial Officer have always contended were fabricated after the investigation.[11]

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[11] Our original decision in this case, stating that respondents' "delinquently produced documents [which included scale tickets and worksheets] contained internal conflicts and inconsistencies and show signs that they were fabricated subsequent to the events themselves" (41 Agric. Dec. at 2191), is not as precise as it should have been, in this respect. All of the worksheets, but only the scale tickets in Transac-

Continued

Even if Mrs. Manson, respondent's bookkeeper, had included the scale ticket numbers on the *original* copy of the invoices sent to all the buyers in the 13 alleged reweighing transactions, that would not have precluded respondent from fabricating the scale tickets at the same time the invoices were prepared.

We will now begin a transaction-by-transaction analysis of 6 of the 14 transactions involved here (the other 8 are discussed in §§ XIII–XVIII, *infra*). Logic would place all of the transaction-by-transaction analyses after § XII(H), ending on p. 424. Instinct has moved these six transactions to the forefront, even though many of the circumstances relied on will not be appreciated until §§ VII–XII have been read.

Ordinarily, where there has been a Watergate-style cover-up of a well designed, fraudulent scheme, one "smoking gun" is the most an investigator can hope to find. Here, we have six transactions (§§ I–V, XVII(A)(3), *infra*) in which "smoking guns" were found. In one transaction alone, Transaction 4 (§ I, *infra*), six "smoking guns" were found.

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tions 10, 11, and 13, appear to have been fabricated "subsequent to the events themselves." Respondent's attorney argues falsely and deceptively that complainant has vacillated with respect to when complainant contends the scale tickets and worksheets were fabricated (Respondent's Reply to Complainant's Response to Appeal at 9–10). He begins by stating: "At page 7 complainant states that *documents* were fabricated 'at some point after the investigation ended and were introduced into evidence with intent to deceive'" (emphasis added). Complainant's page 7, referred to by respondent, charges that the *worksheets* were fabricated "at some point after the investigation ended" (Response to Appeal from Decision and Order on Remand at 7). Respondent then quotes 15 lines of earlier "concessions" by complainant that the *scale tickets* were not fabricated after the investigation to try to prove that complainant is "now making allegations [*i.e.*, that the worksheets were fabricated after the investigation] which it earlier conceded were not correct" (Respondent's Reply to Complainant's Response to Appeal at 10). This illustrates that even when respondent's attorney purports to quote 15 lines of exact language from complainant's briefs, unless you read the entire subject in context, you cannot detect his deception.

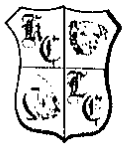
I. In Transaction 4, 24 Separate Circumstances (9 of Which Are so Overwhelming that Each, Standing Alone, Would Be Sufficient to Support Complainant's Case) Compel Me to Infer that the 55 Steers Sold to Graf Cattle Company, Dixon, Illinois, on October 6, 1978, Were the Same 55 Steers Purchased by Respondent the Day Before in Kansas City as Lot No. 66 Weighing 45,350 Pounds (to Which Respondent Added Exactly 3% to the Weight by Pencil), Rather than a Mixture of Lot Nos. 69 and 62X, as Claimed by Respondent, and that Respondent's Worksheet and Scale Ticket Were Fabricated to Cover Up His Fraud.

A. On October 5, 1978, Respondent Purchased 55 Steers Weighing 45,350 Pounds as Kansas City Lot No. 66. He Invoiced Graf the Next Day for 55 Steers Weighing 46,710 Pounds (Exactly 3% More than Respondent's Purchase Weight of Lot No. 66).

Respondent's Kansas City purchase invoice dated October 5, 1978, for Lot No. 66 is reproduced on the next page (RX 23). Respondent's carbon copy of his invoice to Graf Cattle Company, Dixon, Illinois, dated October 6, 1978, is reproduced on the following page (CX 4, p. I).

Kansas City Invoice For Lot No. 66, October 5, 1978 (RX 23)

KANSAS CITY LIVESTOCK ORDER BUYING CO.,



520 LIVESTOCK EXCHANGE BUILDING

KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3205
SAM CAMPBELL 816-333-5376

Area Code 816
PHONE 842-3255

Bought for the Account of --

GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

NO. 66

Date 5 October 1978

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT
Nelson	27	46			22155	77.75	62.20	13,778.00
	28				23195	77.75	62.20	14,420.90
	55		6		45350			

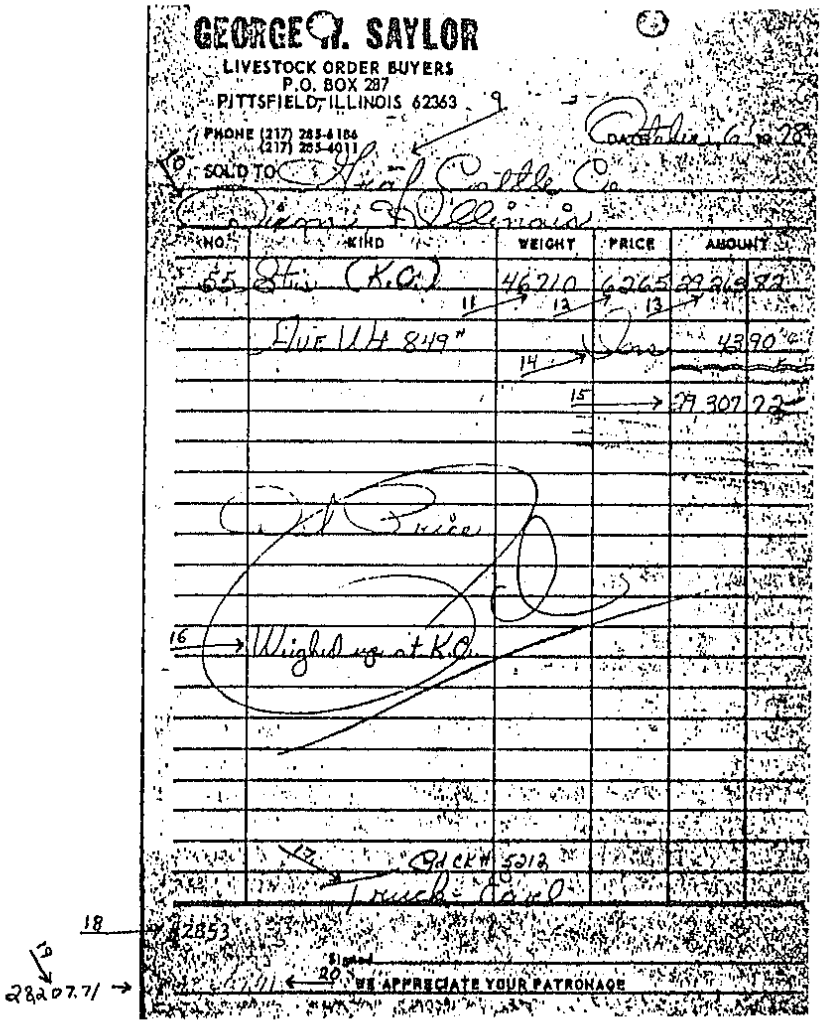
Average Weight 825

Average Cost 62.20

10 Lots Off Hogland
10 Hamps

VACC. REHORNING BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THIRD FREIGHT	
FEED	
COMMISSION	
TOTAL	
CASH	

Transaction 4 Invoice Copied From Respondent's Records (CX 4, p. 1)



GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363
PHONE (217) 285-6186
(217) 285-4011

DATE October 6 19 78

TO SOLD TO Neal Cattle Co
Quincy Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT
55	Sh (K.C.)	46710	62.65	29260 82
	Five UH 849"			43 90
				29 307 72
	Net Price			
	Weighed up at K.C.			
	Gd ck # 5012			
	Truck Load			
2853				

Signed

WE APPRECIATE YOUR PATRONAGE

28207.71

Respondent purchased 55 steers weighing 45,350 pounds (JO Ref. 6, p. 22) on October 5, 1978, as Kansas City Lot No. 66 (JO Ref. 4, p. 22).

On the next day, October 6, 1978, respondent invoiced Graf Cattle Company, Dixon, Illinois, for 55 steers weighing 46,710 pounds (JO Ref. 11, p. 23), *i.e.*, 1,360 pounds more than the purchase weight of Lot No. 66 (46,710 −45,350 = 1,360). This is *exactly* 3% more than respondent's purchase weight the day before. That is, a person using a pocket calculator to add exactly 3% to the purchase weight would read 1,360.5 on the calculator (.03 ×45,350 = 1,360.5), which rounds to 1,360.[12]

Respondent's attorney speciously argues with respect to four similar increases of exactly 2% that the increases were only "approximately" 2%. He argues (Respondent's Reply to Complainant's Opening Brief on Remand at 13):

> The documents which complainant reviewed in its investigation covered several months. Out of all of those transactions complainant found four (4) transactions in which the increased weight due to sorting was approximately two percent (2%) (the U.S.D.A. "rounded" these figures also).

Leaving aside the fact that respondent neglected to refer to the three other transactions in which the increase was exactly 3% (for a total of 7 out of 13 alleged reweighing transactions with increases of exactly 2% or exactly 3%), respondent's argument would have merit if this case involved weight purchases of scrap gold, which is weighed to the nearest pennyweight (1/20 of a troy ounce). But since respondent's livestock scale weighs only to the nearest 5 pounds, when he multiplied the purchase weight of 45,350 pounds by *exactly* .03, and his calculator showed 1360.5, he *had* to use a "rounded" figure when invoicing the customer. Hence the increase here was *exactly* 3%, considered in the context of a livestock scale, not approximately 3%.

Respondent's practice of rounding calculated figures to the nearest 5-pound multiple, after having multiplied weight figures by an *exact* number of pounds of shrink, can be illustrated from respondent's own fabricated worksheets. For example, his worksheet for Transaction 1 is reproduced on the next page (RX 3).

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[12] Respondent frequently uses a pocket calculator. He testified that he uses it when weighing livestock to determine the amount of prorated shrink to include in the *printed* weight shown on the scale tickets (see Tr. 358; § VII(C)(2), *infra*). While he was testifying as a witness, he used his pocket calculator (Tr. 318).

Respondent's Transaction 1 Worksheet (RX 3)

BUYER NO.			
NO. HEAD	KIND	WEIGHT	PRICE

Respondent's Exhibit #3

This worksheet shows that respondent used *exactly* 28 po per head shrink (JO Ref. 21, p. 26) for determining his average rate" on his fabricated worksheet. When respondent allegedl moved two head weighing 1,120 pounds (JO Ref. 22, p. 26), he a *exactly* 28 pounds per head shrink, or 56 pounds on two head Ref. 24, p. 26) (28 ×2 = 56), which gave the two head a weig 1,176 pounds, including shrink (1,120 + 56 = 1,176) (JO Ref. 2 26). Mrs. Munson testified that the shrink on this lot was pounds per head," and that the two animals removed, "[w]ith prorate put back on it of 56 pounds, they figured 1,176" (Tr.

However, after having added *exactly* 28 pounds per head shr respondent rounded the 1,176 pounds to the nearest multiple *i.e.*, to 1,175 pounds (JO Ref. 23, p. 26); Tr. 142), when he was cr lating the weight to be invoiced to the buyer (on his fabric worksheet). His "rounding" to the nearest 5-pound multiple did change the fact that he added *exactly* 28 pounds per head making his calculations.

On respondent's other worksheets, he did the same thing wit showing the rounding. For example, in respondent's Transactio worksheet discussed in the next subsection, respondent used the erage shrink figure of *exactly* 29 pounds (JO Ref. 62, p. 32) when he computed his calculated weight to be invoiced to buyer (on his fabricated worksheet), based on exactly 29 pounds shrink on 33 head, instead of using 957 pounds (29 ×33 = 957), used 955 pounds (JO Ref. 56, p. 32). That was not because he m his calculation on the basis of approximately 29 pounds per he shrink. Respondent's bookkeeper testified that he used 29 poun per head as the average shrink for the lot (Tr. 150-51), and worksheet shows that he used *exactly* 29 pounds per head as average shrink for the lot (JO Ref. 62, p. 32). But after using *exa ly* 29 pounds per head shrink, when making his final calculation the weight to be invoiced to the buyer (on his fabricated wor sheet), he rounded the 957 pounds shrink to 955 pounds, the ne est multiple of 5, since his scale weighs only to the nearest pounds.[13]

[13] It is interesting that only respondent's worksheet for Transaction 1 shows he he "rounded" the weights determined by adding the prorated shrink back if he we "teaching" the ALJ, JO and the court how his worksheets were put together single illustration was apparently deemed sufficient. In all the other worksheets, omitted the step shown on the Transaction 1 worksheet of rounding 1,176 to 1,1 and just showed the rounded figure equivalent to 1,175. Specifically, in Transacti 2 (RX 7A), he showed the alleged weight of 13 steers removed, 6,825 pounds, and t average shrink, 28 pounds per head, which would total 364 pounds shrink (13 × = 364), but, without showing any intervening calculations (e.g., 6,825 + 364 Continu

Accordingly, in this decision, where respondent's invoice weights are exactly 2% or exactly 3% more than his purchase weights, when rounded to the nearest multiple of 5 pounds (which respondent had to do because his livestock scale weighs only to the nearest 5 pounds), the increases are referred to as exactly 2% or exactly 3%, without referring to the rounding. The "rounding" can be interpolated by the reader, as long as the reader bears in mind that the rounding would occur after respondent had multiplied his purchase weight by *exactly .02 or exactly .03* on his pocket calculator.

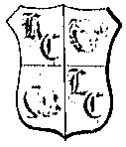
B. On October 5, 1978, Respondent Also Purchased 22 Steers Weighing 19,160 Pounds as Kansas City Lot No. 69 and 94 Steers Weighing 77,650 Pounds as Kansas City Lot No. 62X. Respondent's Worksheet Shows (i) that Graf's 55 Steers Consisted of the 22 from Lot No. 69 and 33 of the 94 from Lot No. 62X, (ii) the Pittsfield Arrival Weight of All 94 Steers in Lot No. 62X, and (iii) the Disposition of the 61 Head Remaining from Lot No. 62X (to Pen 6 of Respondent's Inventory). Respondent's Testimony, Mrs. Manson's Testimony and Respondent's Scale Ticket Are Consistent with the Worksheet.

Respondent's purchase invoice from Kansas City for Lot No. 69 is reproduced on the next page (RX 25), his purchase invoice from Kansas City for Lot No. 62X is reproduced on the following page (RX 24), and his worksheet (RX 27) and scale ticket (RX 26) for Transaction 4 are reproduced on the third page following this.

7,189), he merely subtracted 7,185 pounds, the rounded figure, from his purchase weight. (The "irregularity" of rounding down to 7,185, instead of up to 7,190, is discussed in § V, *infra*). Transaction 4 is similar, discussed in the text preceding this footnote. In Transaction 9 (RX 50), respondent added 28 pounds of shrink to 84 head, which equals 2,352 pounds (28 ×84 = 2,852), but his worksheet rounded it to 2,350 pounds. In Transaction 10 (RX 55), respondent calculated 24 pounds per head average shrink (1,485 ÷63 = 23.57, which rounds to 24), and then rounded the 24 pounds to 25 pounds when calculating his invoice weight. In Transaction 11 (RX 61), respondent added 28 pounds per head shrink to 58 head, which equals 1,484 pounds, but his worksheet shows only the rounded figure of 1,485 pounds. There was no need to round the shrink figure in Transactions 6 and 7 since the average per head shrink was 25 pounds, a multiple of 5. Similarly, no rounding of shrink was necessary in Transactions 3, 5, 8, 12, 13 and 14 since respondent did not add any prorated shrink in those transactions. Hence, in every transaction except Transaction 1 (the "teaching" transaction), respondent rounded the shrink figures without showing the preliminary calculations.

Kansas City Invoice For Lot No. 69, October 5, 1978 (RX 25)

KANSAS CITY LIVESTOCK ORDER BUYING CO., I



Area Code 816
PHONE 842-3255

Bought for the Account of –

GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

Date 5 October 1978

NO. 69 HOL. STR

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT	PRICE	AMOUNT	TOTAL
[illegible]	7				6505	[illegible]	[illegible]	
[illegible]	8				7615	[illegible]	[illegible]	
[illegible]	7				5615	[illegible]	[illegible]	
	22				19160			

Average Weight 871

Average Cost 51.71

VACC DEHORNING BRANDING
INSURANCE
TRUCKAGE
LOADING CHARGE (RAIL)
FREIGHT
FEED
COMMISSION
TOTAL
CASH

Kansas City Invoice For Lot No. 62X, October 5, 1978 (RX 24)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

32 → 528 LIVESTOCK EXCHANGE BUILDING KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3205
SAM CAMPBELL 816-333-5376
J HAROLD SCHMIDT 816-331-4858
ED GORMAN Bonner Springs, Kansas 913-721-2988
WILL N. CORSON 913-432-0846
OFFICE GLORIA EVANS

Area Code 816
PHONE 842-3255

Bought for the Account of —
GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS
35 → NO. 62X

33 → Date 5 October 1978 19
34 → Shipped to
36 → Via

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
	26	145	X		24385	17.50	61.00	14,874.85	
	32	—			26,758	16.54	60.40	16,922.00	
	32	21	—		26,515	16.43	66.50	16,115.58	
	94	39			77,650			41 → 47,908.43	

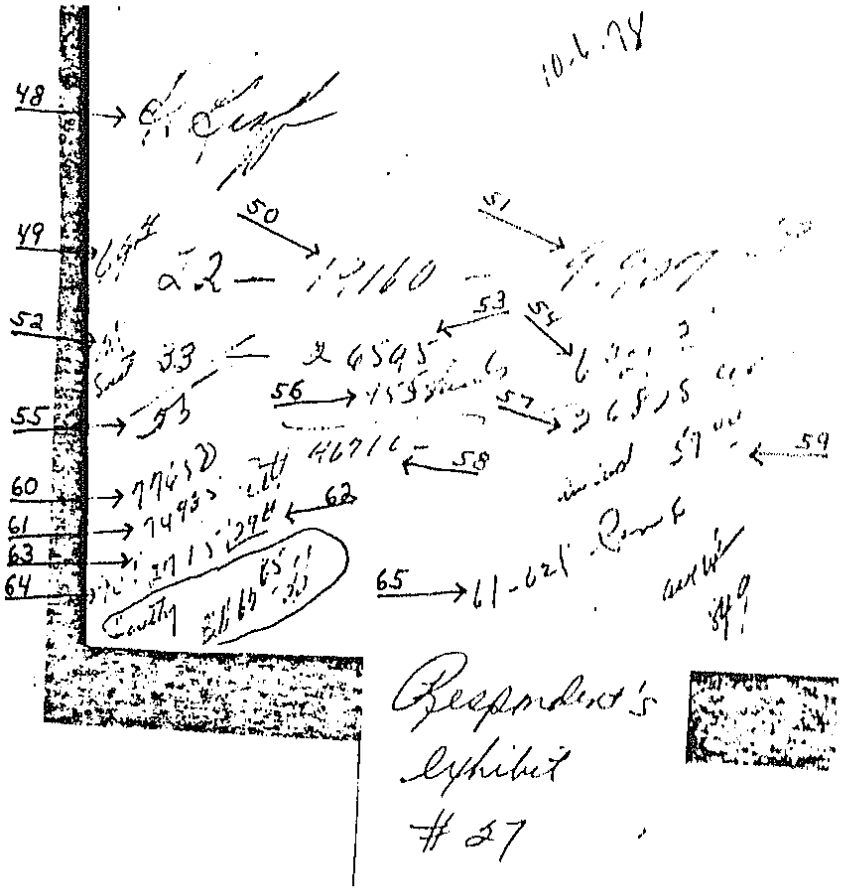
40
42
43
44
45

Respondent's Exhibit #24

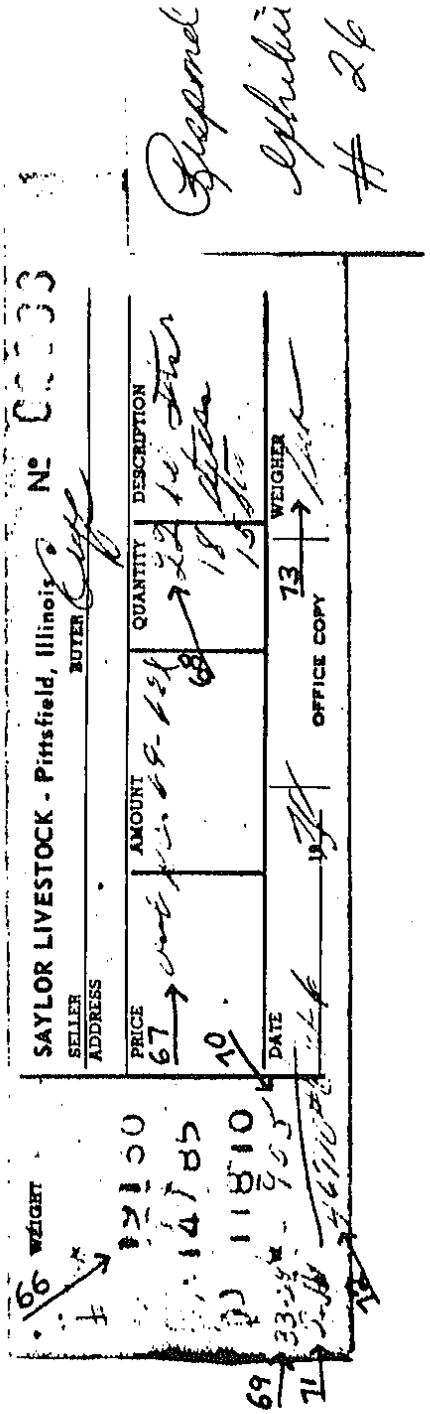
Average Weight 46 → 826 #
Average Cost 60.47

VACC., DEHORNING, BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	
COMMISSION	776.15
TOTAL	
CASH	47 → 47,868.28

Respondent's Transaction 4 Worksheet (RX 27)



Respondent's Transaction 4 Scale Ticket (RX 26)


SAYLOR LIVESTOCK - Pittsfield, Illinois
SELLER
ADDRESS
BUYER
WEIGHT
PRICE
AMOUNT
QUANTITY
DESCRIPTION
DATE
WEIGHER
OFFICE COPY
Respondent Exhibit # 26

On October 5, 1978, respondent purchased 22 steers weig 19,160 pounds (JO Ref. 29, p. 30) as Kansas City Lot No. 69 (JO 27, p. 30). On the same day, he purchased 94 steers weighing 7 pounds (JO Ref. 40, p. 31) as Kansas City Lot No. 62X (JO Re p. 31).

Respondent's worksheets were allegedly prepared at the tim spondent was sorting and weighing the animals, and then use his bookkeeper, Mrs. Manson, to prepare the invoices to resp ent's customers (see § XII(F), *infra*). Respondent's worksheet Transaction 4 shows that the 55 head (JO Ref. 55, p. 32) invoice Graf (JO Ref. 48, p. 32) on October 6, 1978, was composed of Lot 69 (JO Ref. 49, p. 32) purchased by respondent at Kansas Cit October 5 (consisting of 22 head weighing 19,160 pounds) (JO 50, p. 32; Tr. 249–53, 324–26) and 33 head sorted out of a total head purchased by respondent at Kansas City on October 5 as No. 62X (JO Ref. 52, p. 32; Tr. 249–53, 324–26).

According to respondent's worksheet for Transaction 4, non the 55 steers purchased by respondent on October 5, 1978, Kansas City Lot No. 66 weighing 45,350 pounds, discussed in section I(A) above, were sold to Graf. Respondent's bookkee Mrs. Manson, testified (Tr. 251):

> Q. Right. I wanted you to confirm, and you did, that my understanding that the work sheet showed that the 55 head that went to Mr. Graff, as shown in the invoice in Respondent's Exhibit 28, were made up of Lots 69 and 62 X.
>
> A. Yes, that's what the work sheet says.
>
> Q. If that is true, then, Lot 66 as shown on Respondent's Exhibit 23, is irrelevant.
>
> A. Yes.

Respondent's testimony (Tr. 324–25), which is to the same effi as Mrs. Manson's testimony, just quoted, is quoted below § I(C)(1)(a). Similarly, the cover sheet for respondent's exhibits as Transaction 4, which outlines his version of the facts, is consiste with their testimony. The cover sheet is reproduced on the ne page.

Respondent's Cover Sheet To Transaction 4 Exhibits

KANSAS CITY		ORDER		BUYERS
Load #66	55 head	weight 45350		
Load #69	22 head	weight 19160	at Pittsfield	Sold 55 to Graf
Load #62X	94 head	weight 77650		

Sort out 33 from Load
#62X Weight 46710

Add to 22 from Load #69
scale weight 46710

exhibits 23 through 25 Purchase Invoices
exhibit #26 scale ticket
exhibit #27 worksheet
exhibit #28 billing
Witnesses: George Saylor, Dorothy Manson

Accordingly, it is clear that respondent's worksheet and cover sheet for Transaction 4 are consistent with respondent's testimony and Mrs. Manson's testimony that the 55 steers sold to Graf in Transaction 4 consisted of the 22 steers from Kansas City Lot No. 69 and 33 steers from Lot No. 62X. (I have gone to such lengths to prove what is, up to now, admitted by respondent because in Transaction 14, discussed next, respondent's position is just as clear as in this transaction, but his attorney apparently is trying to repudiate respondent's whole defense, and present a new defense. He will either have to confess error or do the same here!)

Furthermore, respondent's worksheet and Mrs. Manson's testimony (cited, but not quoted, below) states that (i) *all of the 94 head in Lot No. 62X came to Pittsfield and were weighed in Pittsfield*, and (ii) *the remaining 61 head from Lot No. 62X* (94 −33 = 61) went to respondent's inventory, specifically, to his Pen 6. Respondent's testimony (cited, but not quoted, below), although more sketchy than that of Mrs. Manson, is consistent with her testimony and the worksheet. Also, respondent's scale ticket for Transaction 4 is consistent with the worksheet.

The importance of understanding respondent's position precisely, and understanding every figure on his worksheet, is that there are enough holes in his worksheet to drive a fleet of Mack trucks through. For example, documentary evidence photocopied from respondent's records shows that he sold Kansas City Lot No. 69 weighing 19,160 pounds to someone else on the same day he invoiced the 55 steers to Graf in Transaction 4 (§ I(C)(2)(a), *infra*). Hence those 22 steers were not part of the Graf shipment.

Moreover, documentary evidence photocopied from respondent's records shows that only 47 (or probably 51) of the 94 steers in Lot No. 62X came to Pittsfield (30 steers from Lot No. 62X went directly from Kansas City to Swift's Feed Yard in Omaha, Nebraska, by a different trucking company from the one used to transport the 47 or 51 head to Pittsfield) (§ I(C)(1)(a), *infra*). (This is not "trip sheet" evidence. This is information on the Kansas City invoice for Lot No. 62X.)

Turning now to a detailed analysis of respondent's worksheet for Transaction 4, the invoice weight to Graf of 46,710 pounds (JO Ref. 58, p. 32) was obtained by adding (i) the Kansas City purchase weight of the 22 steers in Lot No. 69, 19,160 pounds (JO Ref. 50, p. 32; Tr. 151, 252–53, 324–26), (ii) the Pittsfield weight of 33 head sorted out of Lot No. 62X, 26,595 pounds (JO Ref. 53, p. 32; Tr. 151, 325), and (iii) the "rounded" prorated shrink of the 33 head sorted out of Lot No. 62X, 955 pounds (JO Ref. 56, p. 32; Tr. 150–51, 251–52, 325).

The 955 pounds of prorated shrink on the 33 head allegedly sorted from Lot No. 62X was computed by first computing the total shrink *on the 94 head, i.e.*, by subtracting the Pittsfield "in weight," or arrival weight, *of the 94 head* in Lot No. 62X, 74,935 pounds (JO Ref. 61, p. 32; Tr. 151–52),[14] from the Kansas City purchase weight of Lot No. 62X, 77,650 pounds (JO Ref. 60, p. 32; Tr. 151), which equals 2,715 pounds (JO Ref. 63, p. 32; Tr. 151). Dividing the total shrink (2,715 pounds) *by the 94 head* (JO Ref. 64, p. 32) results in an average shrink of 28.88 pounds per head (2,715 ÷94 = 28.88), which rounds to 29 pounds (JO Ref. 62, p. 32; Tr. 151). Multiplying the average shrink per head (29 pounds) by the 33 head allegedly used from Lot No. 62X in Transaction 4 results in the prorated ("rounded") shrink of 955 pounds for the 33 head (29 ×33 = 957, which rounds to 955) (JO Ref. 56, p. 32; Tr. 150–51, 325).

Since Lot No. 62X contained 94 head, all of which allegedly came to Pittsfield (according to the worksheet and Mrs. Manson's testimony (Tr. 149–52)), and only 33 head were allegedly used in Transaction 4, leaving a balance of 61 head (94 −33 = 61), the worksheet very neatly shows that the remaining 61 head from Lot No. 62X went to respondent's inventory, specifically to his Pen 6 (JO Ref. 65, p. 32; Tr. 209).

[14] The Pittsfield "in-weight" or arrival weight is allegedly determined by respondent's yardman, who was not named or called as a witness, but no scale ticket is made by the yardman. He allegedly writes the Pittsfield in-weight on a sheet of paper, which is then used by respondent in preparing his worksheet (see § VIII, *infra*).

Turning now to respondent's scale ticket for Transaction 4 (which was made on October 6, 1978, *before the first visit* to respondent's facilities in mid-October 1978 by Mr. Kostelecky, one of complainant's investigators), the scale ticket is entirely consistent with respondent's worksheet for the transaction. The weigher is shown as "Geo" (JO Ref. 73, p. 32), *i.e.*, respondent George Saylor. Mrs. Manson testified that the scale ticket is in his handwriting (Tr. 183-84).

The scale ticket shows on its face "out KC 69-62X" (JO Ref. 67, p. 32). It has three printed weights. The top printed weight, "19160" (JO Ref. 66, p. 32), is the exact Kansas City purchase weight of the 22 steers in Lot No. 69 (JO Ref. 29, p. 30). Opposite that weight, the scale ticket shows "22 hd strs" (JO Ref. 68, p. 32). (Assuming that the 22 head shrank about 29 pounds per head, as claimed by respondent for Lot No. 62X purchased the same day in Kansas City, the scale ticket failed to show the additional 638 pounds of shrink in the total load (29 ×22 = 638). Mrs. Manson testified (Tr. 252-53) that they only "put the shrink onto the ones that the sorting was done.")

The second and third printed weights on the scale ticket, allegedly for 33 steers (18 + 15 = 33), total 26,595 pounds (14,785 + 11,810 = 26,595), the exact weight shown on the worksheet for the 33 steers from Lot No. 62X (JO Ref. 53, p. 32). The handwritten figure of "955" in the lower left-hand corner (JO Ref. 70, p. 32) is the amount of shrink shown on the worksheet for the 33 head from Lot No. 62X (JO Ref. 56, p. 32). In fact, the lower left-hand corner of the scale ticket shows the computation for the 955 pounds of shrink, *i.e.*, "33 −29# Per Hd"[15] (JO Ref. 69, 71, p. 32).

The handwritten weight of "46710#" (JO Ref. 72, p. 32) is the sum of the three printed weights, plus the 955-pound prorate figure. This is the weight invoiced to the buyer in Transaction 4 (JO Ref. 11, p. 23).

It should be noted that the harmony between the scale ticket and worksheet does not prove that the worksheet was created at the same time as the scale ticket, or that both documents are genuine. The 29-pounds-per-head shrink figure could easily have been selected arbitrarily when the scale ticket was being made, and a pocket calculator could have been used to determine the two weights to be printed, along with the 955 pounds of shrink and the 19,160 pounds

[15] I believe that the illegible word in the lower left-hand corner is "Per Hd" (JO Ref. 71, p. 32), but it could be "Pr Rt," for "prorate." Mrs. Manson testified that it "would mean pro-rate" (Tr. 252), but whether it is "Per Hd" or "Pr Rt," either would indicate that the 955 pounds is the prorated shrink of 33 steers at 29 pounds per head.

from Lot No. 69, to equal the predetermined weight of 46,710 pounds, 3% more than the weight of Lot No. 66. The worksheet could easily have been made at a later date, after the investigation. Indeed, the specificity on the scale ticket would have "locked in" the story that had to be told on the worksheet.

In any event, since both documents show that the 55 steers to Graf came from Lot Nos. 69 and 62X, and both documents reflect the 29 pounds per head shrink of the 33 steers from Lot No. 62X (allegedly computed on the basis of the Pittsfield arrival weight of *all 94 steers* in Lot No. 62X), the documentary evidence discussed in §§ I(C)(1)(a) and I(C)(2)(a), *infra*, showing that all 94 steers in Lot No. 62X did not come to Pittsfield, and that all 22 steers in Lot No. 69 were delivered by respondent to another customer, proves that both the worksheet and scale ticket are complete fabrications, designed to conceal respondent's fraudulent weight addition in Transaction 4.

C. Six Strongest Circumstances in Transaction 4—Each Involving Documentary Evidence (a "Smoking Gun") So Overwhelming that, Standing Alone, Would Prove Complainant's Case)—that Compel Me to Infer that the 55 Steers Sold to Graf Cattle Company, Dixon, Illinois, on October 6, 1978, Were the Same 55 Steers Purchased by Respondent the Day Before in Kansas City as Lot No. 66 Weighing 45,350 Pounds (to Which Respondent Added Exactly 3% by Pencil), Rather than a Mixture of Lot Nos. 69 and 62X, as Claimed by Respondent, and that Respondent's Worksheet and Scale Ticket Were Fabricated to Cover Up His Fraud.

There are 24 circumstances that compel me to infer that the 55 steers sold to Graf in Transaction 4 came from Lot No. 66, with 3% added to the weight by pencil, rather than from Lot Nos. 69 and 62X. Eight are "affirmative" circumstances showing that Lot No. 66 was used in Transaction 4; 4 are "negative" circumstances showing that Lot Nos. 69 and 62X were not used in Transaction 4; and 12 are miscellaneous circumstances supporting complainant's position that the worksheet and scale ticket for Transaction 4 were fabricated.

Logic would dictate listing the 24 circumstances in the order referred to in the preceding paragraph. But since the court may not want to read about 24 circumstances, when one or two, or a few, will do, I am presenting, first, the two strongest circumstances from each category (in the reverse order from that listed above).

1. Two Strongest "Miscellaneous" Circumstances ("Smoking Guns") Showing that Respondent's Worksheet and Scale Ticket in Transaction 4 Were Fabricated.

   a. The Worksheet for Transaction 4 Shows the Pittsfield "In-Weight" or Arrival Weight of All 94 Head From Lot No. 62X, and Per Head Shrink Computations Based on All 94 Head, but the Kansas City Purchase Invoice for Lot No. 62X Shows that 30 Head from the Lot Went Directly to Swift at Omaha by the M&I Trucking Company, and Only 47 Head (or, More Likely, 51 Head) Were Transported to Pittsfield by the Merle Springer Trucking Company.

As shown in § I(B), *supra*, the worksheet for Transaction 4, which is allegedly made up by respondent while the events are occurring, and then given to his bookkeeper for the preparation of the invoice, shows the Kansas City invoice weight of the 94 steers in Lot No. 62X, *i.e.*, 77,650 pounds, and the Pittsfield "in-weight," or arrival weight, *of all 94 steers*, 74,935 pounds. Subtracting the Pittsfield arrival weight of all 94 steers from the Kansas City invoice weight results in transit shrink of 2,715 pounds. Dividing the transit shrink of the entire lot by 94, the alleged number of animals in Lot No. 62X weighed at Pittsfield, results in transit shrink of 29 pounds per head.

However, documentary evidence, *viz.*, respondent's Kansas City purchase invoice for Lot No. 62X (JO Ref. 35, p. 31), shows that all of the 94 head in Lot No. 62X did not come to Pittsfield. Lot No. 62X consists of three separate purchases of 30 head, 32 head, and 32 head respectively (JO Ref. 37, 38, 39, p. 31). The Kansas City invoice for Lot No. 62X shows that the 30-head lot (JO Ref. 37, p. 31) was shipped to Swift at Omaha by "M&I" (JO Ref. 33, p. 31), *i.e.*, M&I Truck Line, Inc. (see CX 2, p. 14; CX 3, p. 13; CX 7, p. 9; CX 8, p. 9; CX 9, p. 9; CX 14, p. 21). These 30 head were, undoubtedly, going to Swift's Feed Yards, at Omaha, Nebraska. (If we did not know or infer that Swift Packing Company had livestock feeding facilities at Omaha, we could ascertain that fact from a similar Kansas City invoice showing cattle "Shipped to Swift Feed Yards, Omaha," by the "M&I" Trucking Company (RX 15)).

This, by itself, shows that, at most, only 64 of the 94 head in Lot No. 62X could have come to Pittsfield. Hence, this, by itself, proves that the worksheet for Transaction 4, showing the Pittsfield arrival

weight and shrink computations for all 94 head from Lot No. 62X, is a total fraud. And since the same 955-pound shrink figure (allegedly computed on the basis of the Pittsfield "in weight" of all 94 head) is shown on the scale ticket, this proves that the scale ticket is a total fraud.

In evaluating the documentary evidence just discussed, it is important for the court to know that after respondent bought cattle at Kansas City, he cleared them through the Kansas City Livestock Order Buying Company, which handled all of the details for him for 10¢ per cwt, including arrangements with truckers (Tr. 28).[16] Respondent testified (TR. 308-09):

> Q. Now, Mr. Saylor, generally speaking, do you go down and examine your cattle in the yards after you buy them?
>
> A. No, sir, I don't.
>
> Q. What arrangements do you have in Kansas City?
>
> A. At the time referred to here, we were clearing through Kansas City Livestock, and their people would take care of the cattle. Now, I clear my own cattle and I have a driver of my own that takes care of them.[17]

Accordingly, the information as to where to ship the 94 head of cattle in Lot No. 62X was given initially by respondent to the Kansas City Livestock Order Buying Company, which then handled the cattle in accordance with respondent's directions. Here the documentary evidence shows that the Order Buying Company sent 30 head from Lot No. 62X to Swift's Feed Yards, at Omaha, Nebraska, by M&I Trucking Company, Inc., which is a different trucking company from the one used to transport a portion of Lot No. 62X to Pittsfield.

Moreover, the Kansas City invoice for Lot No. 62X further shows that only "47 hd" of the 94 head were shipped "to Pittsfield" (JO

[16] The President of Kansas City Livestock Order Buying Co., Inc., told Mr. Riley, one of complainant's investigators, that "Kansas City Order Buyers paid the different commission companies for the cattle that Mr. Saylor purchased, and Kansas City Order Buyers employees, they would take care of Mr. Saylor's cattle while they were at the stockyards at the time that he bought them, saw that they were penned and taken care of and loaded out when he wanted them loaded out; and for that services, they charged him 10 cents a hundredweight for the services they rendered to him" (Tr. 28).

[17] Mrs. Manson wrote a check on October 6, 1978, to "Kansas City Livestock, 528 Livestock Exchange, Kansas City, Mo. 64102" (CX 4, p. 5), which is the address of the Kansas City Livestock Order Buying Company (JO Ref. 32, p. 31), in full payment for Lot Nos. 66, 69, 62X, and others.

Ref. 34, p. 31) "Via Saylor-Springer" (JO Ref. 36, p. 31), *i.e.*, Merle Springer Trucking (see CX 11, p. 8; CX 12, p. 14). Actually, the figure of 47 seems to be erroneous, *i.e.*, it would appear that 51 head came to Pittsfield, but the four-head error is of no importance here. Nonetheless, I will explain how I believe the four-head error occurred at Kansas City.

The calculations in the middle of the left-hand side of the Lot No. 62X invoice show what happened to the 32 animals (JO Ref. 39, p. 31) in the last of the three purchases comprising the 94 animals in Lot No. 62X. (The pencil line connecting the calculations with the figure "32" (JO Ref. 39, p. 31) was not added by the Judicial Officer.) Of the 32 animals in this portion of the 94-head lot, 7 head went to Graf (JO Ref. 42, p. 31). This is not part of the 55 involved in Transaction 4. The tabulation of all purchases and sales of respondent's transactions, which was done "somewhat" under Mr. Gentry's supervision (which is discussed at length below in § IX(A)), shows that on the same date Graf purchased the 55 steers involved in Transaction 4, he purchased 60 additional head from respondent, divided into two subparts, 7 and 53 (Tr. 369–70).[18] Hence 7 head from Lot No. 62X were undoubtedly combined with 53 head from some other lot [19] to make up the additional 60 steers purchased by Graf from respondent on October 6, 1978.

The second figure in the middle of the left-hand side of the Lot No. 62X invoice shows "15 head to Pittsfield" (JO Ref. 43, p. 31). Combining that 15 head with the 32 head in the second purchase in Lot No. 62X (JO Ref. 38, p. 31) would result in the figure of 47 head shown as shipped to Pittsfield on the invoice (JO Ref. 34, p. 31), which was probably entered at that stage of the computation.

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[18] Since Mr. Gentry personally conducted the investigation as to all 14 transactions (see § IX(A), *infra*), and he testified that the tabulation "was done somewhat under my direction and I was involved in it" (Tr. 369), it was appropriate for him to use this particular aspect of the tabulation in his testimony. (Furthermore, the tabulation was prepared from photocopies of respondent's records, and, therefore, if respondent disagreed with Mr. Gentry's testimony, respondent could have used his own records to rebut the testimony.) But even if Mr. Gentry's testimony based on the tabulation were improper, that would not damage complainant's case as to Transaction 4 one iota, in view of the massive evidence as to Transaction 4. Even as to the one circumstance involved in this subsection (which is 1 of 24 relied upon), the 30 head shipped directy to Swift at Omaha is decisive, irrespective of these 7 head "to Graf Cattle."

[19] Mrs. Manson's check stub shows that her payment of $248,856.33 to Kansas City Livestock Order Buying Company on October 6, 1978, included payment for Lot No. 67, consisting of 53 steers, in addition to payment for Lot Nos. 66, 69 and 62X, discussed in this section (CX 4, p. 5).

However, the middle of the left-hand side of the invoice in Lot No. 62X then shows an additional four head to Pittsfield (JO Ref. 44, p. 31), which, presumably, was an afterthought that did not prompt a change in the figure of 47 head shown as shipped to Pittsfield (JO Ref. 34, p. 31).

Finally, the middle of the left-hand side of the Lot No. 62X invoice shows that six head were held in Kansas City (JO Ref. 45, p. 31). (Presumably, respondent left instructions as to these.)

From the foregoing, it is clear that only 47 head (or, more likely 51 head) of the 94 head in Lot No. 62X were shipped to Pittsfield.

Mrs. Manson erroneously testified that the notations in the middle of the left-hand side of the Lot No. 62X invoice, just discussed, were respondent's handwriting. Specifically, she testified (Tr. 149-50):

> Q. What is Exhibit No. 24 [the Lot No. 62X invoice]?
>
> A. That is also a purchase sheet from Kansas City, Livestock Order buyers, for ninety-four steers.
>
> Q. All right. You will notice there is a notation on that, written down on the side. Would you tell us what that is?
>
> A. "Seventy [Seven] head to Graf Cattle. Fifteen head to Pittsfield and four to Pittsfield and there were six holdovers," out of that one draft of thirty-two head.
>
> Q. All right. Whose writing is that?
>
> A. That is George's.
>
> Q. When you say, "George", you mean Mr. Saylor?
>
> A. Yes.

Even if the notations on the left-hand side of the Lot No. 62X invoice were in respondent's handwriting, it would still show that only a portion of Lot No. 62X was to come to Pittsfield. That is, the figures were undoubtedly written in Kansas City, leading to the end result that only "47 hd" were to be shipped "to Pittsfield" (JO Ref. 34, p. 31), via Merle Springer Trucking (JO Ref. 36, p. 31), while 30 head were to be shipped to Swift's Feed Yard at Omaha, via M&I Trucking Company (JO Ref. 33, p. 31).

However, respondent recognized instantly that he did not write the notations in the middle of the left-hand side of the Lot No. 62X invoice, just discussed, and that the notations were made by the Kansas City personnel to show how to load the livestock. He testified (Tr. 324-25) (emphasis added):

Q. Would you look there at Exhibit No. 24 [the Lot No. 62X invoice] and there is a notation made on this seven head of Graf cattle, out of 32.

A. Exhibit which, sir?

Q. Exhibit No. 24.

Judge WEBER: I think you were looking at No. 25.

A. Seven head. They took how many head out of there?

By Mr. SCHIMMEL:

Q. It looks like you took 33 head out of that 62 X.

A. It was 33 head weighing 26,595, plus whatever the shrink might have been. [Respondent was obviously looking at the worksheet (RX 27), instead of the Lot No. 62X invoice, as requested.]

Q. That appears to have been $955?

A. No, 955 pounds.

Q. Pounds, excuse me.

Now, if you will go to No. 26 [scale ticket] and see if you can identify anything from there?

A. Evidently 955 pounds was the—my copy is very light.

Q. Does that show up there out of K.C. 69 and 62 X, is that 22?

A. Yes, sir, 22.

Q. And then there are 18 steers and 15 steers which would be 33 which came out of stock?

A. The 33 would have come out of 62 X. *I take it from notes that have been put on here evidently from Kansas City or something that they have done a lot of shuffling around here when they loaded out.* [Respondent had obviously turned back to the Lot No. 62X invoice (RX 24), as originally requested.] At this time, this is too many days past for me to have any rememberance.

The documentary evidence showing that all 94 head in Lot No. 62X did not come to Pittsfield is a "smoking gun" (a closer analogy would be the "mushroom" cloud of a nuclear explosion). If there were no other circumstances in the record as to Transaction 4, this circumstance, standing alone, would compel me to infer that the

worksheet was fabricated. That is, a worksheet showing the Pittsfield arrival weight of all 94 animals in Lot No. 62X, with the shrink computation based on all 94 animals, has to be a fabrication when documentary evidence, supplied by respondent from his files, shows that, at most, only 51 head from the 94 head in Lot No. 62X came to Pittsfield.

Since the worksheet for Transaction 4 is a complete fabrication, the scale ticket is necessarily a complete fabrication. As shown in § 1(B), *supra*, the scale ticket is in complete harmony with the fabricated worksheet. In particular, the scale ticket refers to the 29-pound-per-head shrink, which could *only* have been computed by comparing the Kansas City invoice weight of the *94 head* with the Pittsfield arrival weight of the *94 head.*[20] Since the 94 head never came to Pittsfield, the 955-pound shrink figure on the scale ticket is a complete fraud, leading to the obvious inference that the entire scale ticket is a complete fraud, designed to cover up respondent's addition of exactly 3% to the purchase weight of Lot No. 66.

If the court wonders how respondent could have been so careless (or stupid) as to pick Lot No. 62X as the basis for his cover-up, it should be remembered that this transaction occurred *before the first visit by Mr. Kostelecky* in mid-October 1978. Hence he was not as careful as he was after mid-October 1978.

Also, respondent undoubtedly dummied up the scale ticket for Transaction 4 (which is serially numbered by the printer and required to be kept by respondent), "locking" him into Lot Nos. 69 and 62X for his cover-up, before he saw the Kansas City invoice for Lot No. 62X. It is unusual that the "Shipped to" portion of the Kansas City invoice showed that 30 head went to Omaha and 47 head went to Pittsfield. Of the 21 Kansas City invoices appearing in the record (RX 1, 9, 10, 11, 12, 13, 14, 15, 16, 23, 24, 25, 29, 30, 37, 41, 46, 47, 48, 52, 63), the invoice for Lot No. 62X is the *only* invoice that shows in the "Shipped to" heading that part of the load was shipped to one place and part of the load to another.

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[20] To determine the per head shrink of the 47 or 51 head that actually came to Pittsfield would have required "catch-weights" for the 47 or 51 head showing their Kansas City weight and their Pittsfield weight. There is nothing in the record or in respondent's briefs to suggest that such "catch-weights" were taken. To the contrary, the worksheet shows the Pittsfield arrival weight, 74,935 pounds (JO Ref. 61, p. 32), of all 94 head. If that were the arrival weight of only 51 head, they would have weighed 1,469 pounds each (74,935 ÷ 51 = 1,469.3). Moreover, to determine the shrink, the 2,715-pound weight loss (JO Ref. 63, p. 32) would have been divided by 51 not 94), to produce a shrink per head of 53 pounds (2,715 ÷ 51 = 53.2), not 29 pounds, as shown on the worksheet.

Once respondent was "locked" into using Lot No. 62X for his cover-up, he had no reasonable basis for coming up with a Kansas City catch weight for the 47 or 51 head that actually came to Pittsfield. Hence he was forced to use the invoice weight of the 94 head and the alleged Pittsfield weight of the 94 head to come up with his 29-pound-per-head shrink figure shown on the scale ticket.

b. The Worksheet for Transaction 4 Shows that After 33 Head of the 94 Head in Lot No. 62X Went to Graf, the Remaining 61 Head Went to Pen 6 of Respondent's Inventory, but the Kansas City Purchase Invoice for Lot No. 62X Shows that Only 47 Head (or, More Likely, 51 Head) Actually Came to Pittsfield.

The lower right-hand corner of the worksheet for Transaction 4 shows "61—62X—Pen 6" (JO Ref. 65, p. 32). Mrs. Manson confirmed, what is obvious from the worksheet itself, that this shows that after 33 head from Lot No. 62X were shipped to Graf, the remaining 61 head from Lot No. 62X (94 −33 = 61) went into respondent's inventory, specifically into respondent's Pen 6. She testified (TR. 209):

> Q. I take this work sheet to mean that 33 head out of Lot 62–X consisting of 93 [94] head, went in to make up the load of 55 head that went to Mr. Graf. The remaining 61 head out of Lot 62–X went to Pen 6?
>
> A. Yes.

However, as shown in § 1(C)(1)(a), immediately above, only 47 head from Lot No. 62X (or, more likely, 51 head) actually came to Pittsfield. Thirty head from Lot No. 62X went directly to Swift's Feedlot in Omaha, Nebraska, 7 head went to Graf in a different shipment, and 6 head were held in Kansas City.

Accordingly, the notation on the worksheet, that 61 head from Lot No. 62X went to respondent's inventory, specifically to Pen 6 of respondent's inventory, intended to make the worksheet more believable by showing the complete disposition of all 94 head in Lot No. 62X, instead shows that the worksheet is a complete fraud. Sixty-one head could not have gone into respondent's inventory from Lot No. 62X because not more than 51 head arrived in Pittsfield. If 33 head from the 51 head in Lot No. 62X that came to Pittsfield had been used in Transaction 4, that would have left only 18 to go into inventory (51 −33 = 18).

This is another "smoking gun," which, standing alone, would compel me to infer that the worksheet is a fabrication. The com-

plete detail in the worksheet, even showing the number of the pen where the 61 remaining head from Lot No. 62X allegedly went, shows the outrageous nature of respondent's fraudulent worksheet fabricated to cover up his weight fraud.

Since the worksheet is a total fraud, the scale ticket, which is entirely consistent with the worksheet, is necessarily a total fraud.

2. Two Strongest "Negative" Circumstances ("Smoking Guns") Showing that Respondent's Worksheet and Scale Ticket in Transaction 4 Were Fabricated.

We have seen in the first two subsections above the disastrous nature of respondent's reliance in his worksheet on the 94 steers in Lot No. 62X. We shall see in subsections (a) and (b) below the equally disastrous nature of respondent's reliance in his worksheet on Lot No. 69.

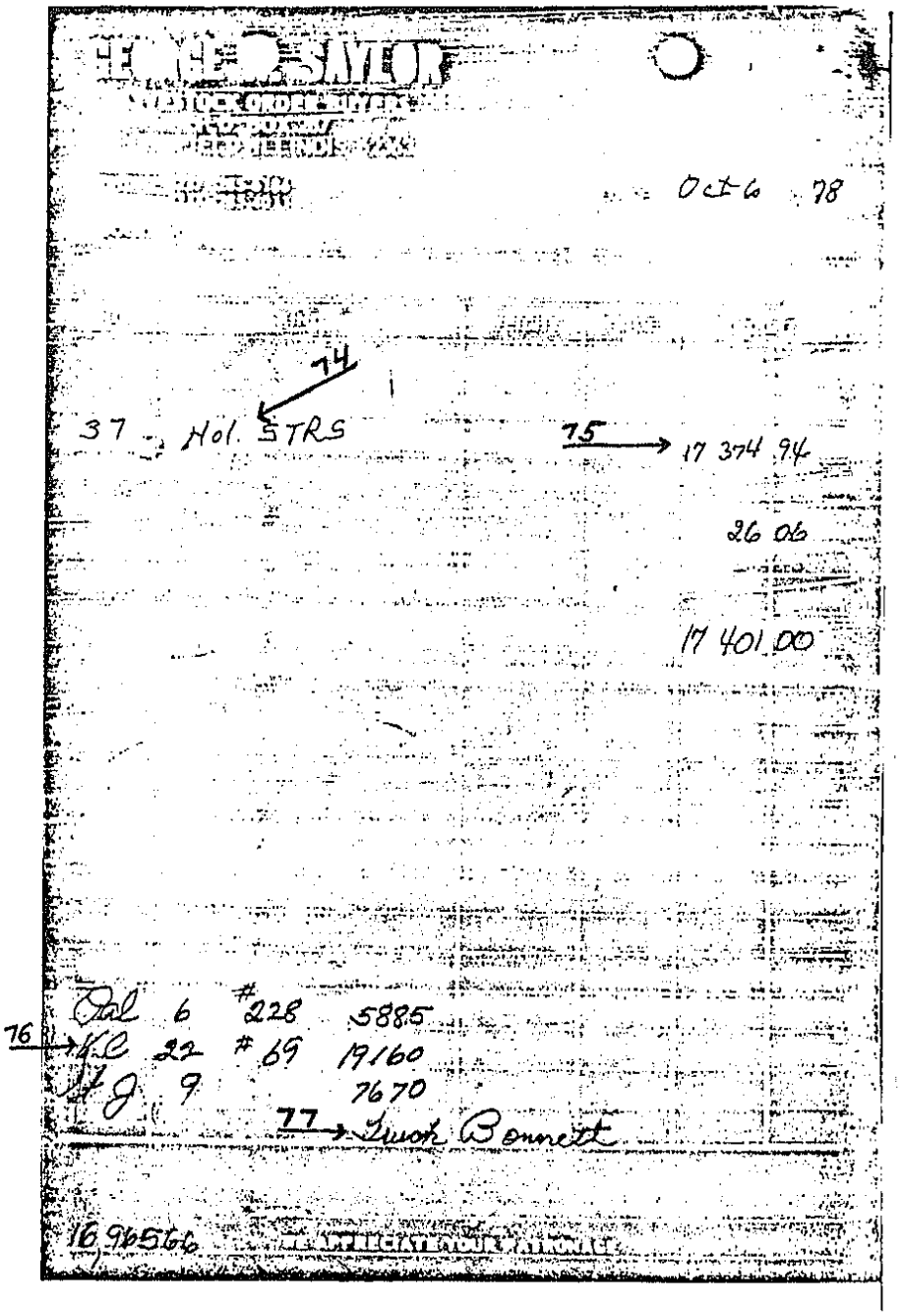
The two circumstances set forth below are "negative" circumstances showing that the 22 steers weighing 19,160 pounds purchased by respondent on October 5, 1978, as Kansas City Lot No. 69, which respondent's scale ticket and worksheet show were part of the 55 head shipped to Graf in Transaction 4, were not shipped to Graf.

a. The Worksheet for Transaction 4 Shows that the 22 Steers Purchased by Respondent in Kansas City on October 5, 1978, as Lot No. 69 Weighing 19,160 Pound Went to Graf, but Documentary Evidence from Respondent's Records Shows that He Sold the Same 22 Steers, *i.e.*, "KC 22 #69 19160," on October 6, 1978, to Another Customer in Pleasant Hill, Illinois.

As shown in § I(B), *supra*, respondent's worksheet and scale ticket show that the 22 steers purchased by respondent as Kansas City Lot No. 69 weighing 19,160 pounds were sent to Graf on October 6, 1978, as part of the 55 head in Transaction 4. However, respondent's records contain documentary evidence to the contrary.

Complainant's Exhibit 20, p. 1, which is an invoice photocopied from respondent's records, is reproduced on the next page. Mrs. Manson's check and check stub for payment to Bonnett Trucking is reproduced on the following page (CX 20, p. 3).

Invoice Copied From Respondent's Records (CX 20, p. 1)



Oct 6 78

74

37 Hol. STRS 75 → 17 374 94

26 06

17 401 00

Oct 6 #228 5885

76 → Kl 22 #69 19160

Jg 9 7670

77 → Lucor Bonnett

16 965 66

Respondent's Check and Check Stub (CX 20, p. 3)

GEORGE W. SAYLOR, JR.
LIVESTOCK
P. O. BOX 387
PITTSFIELD, ILL. 62363

5206

70 637
812

Oct 11 1978

PAY ONE SAYLOR 447 DOLS 08 CTS DOLLARS $447.08

TO THE ORDER OF
Emmett Trucking
216 E. Brown
Pittsfield Illinois 62363

GEORGE W. SAYLOR, JR.
LIVESTOCK

Farmers State Bank
Pittsfield, Illinois 62363

NOT-NEGOTIABLE

⑆08 1 2⑈06 37 1: ⑈40⑈026⑈ 2⑈

GEORGE W. SAYLOR, JR.
PITTSFIELD, ILL.

DELUXE - FORM WVO-2 V-BPL

DATE	NO	KIND	WT.	CWT		AMOUNT
10-6-78	Sitts	White Hill	40 Stu	18	Trip	50 00
10-6-78	Sitts	C. Hill	37 Stu		Trip	30 00
10-10-78	Sitts	Bichelle	34 Stu 1/Hd	38114 @ 70		266 80
10-11-78	Saylor	Whitetail	59 Stu		2 Trips	60 00
10-11-78	White Hill	Schutz	61 Stu	42756 @ 80		35 48
			220 Hd			442 38
					Com Inc	4 30
					TOTAL	447 08

Respondent's invoice dated October 6, 1978, reproduced above, is for 37 Holstein steers (JO Ref. 74, p. 54) sold to an unidentified customer (name illegible on complainant's film (Tr. 368)). Two copies of respondent's invoice for the 37 Holstein steers appear in the record (CX 20, pp.1, 2). The one reproduced above has been enhanced by complainant to show what is legible on the film (Tr. 16, 368-69). The second item at the bottom of the left-hand corner shows "KC 22 #69 19160" (JO Ref. 76, p. 54), showing that these are the identical 22 steers purchased the day before in Kansas City as Lot No. 69, weighing 19,160 pounds. The figures just quoted, *i.e.*, "KC 22 #69 19160," can be seen very clearly on the unenhanced copy of the invoice (CX 20, p. 2) appearing in the Hearing Clerk's original file. But since the writing, as photocopied, is white on a gray background, the figures do not reproduce well when xeroxed. (The original file can be made available to the court, if necessary).

The 22 head from Kansas City Lot No. 69, together with the 6 head from Palmyra and 9 head from St. Joe (Tr. 368), shown immediately above and below "KC 22 #69 19160," make up 37 head, shown on the invoice (JO Ref. 74, p. 54).

The October 6, 1978, invoice for the 37 steers shows "Truck Bonnett" (JO Ref 77, p. 54). Mrs. Manson's check stub for her check dated October 11, 1978, to Bonnett Trucking shows that respondent paid Bonnett Trucking $30 to haul "37 Strs" from "Pittsfield" to "P Hill" on October 6, 1978 (JO Ref. 78, p. 55), the date of the invoice for the 37 steers.

This documentary evidence from respondent's records emphatically demonstrates that the 22 steers in Kansas City Lot No. 69, weighing 19,160 pounds, were not combined with 33 steers from Lot No. 62X to comprise the 55 steers sold to Graf on October 6, 1978. This is a "smoking gun" which, standing alone, would compel me to infer that respondent's worksheet and scale ticket are complete fabrications.

As shown above, respondent's scale ticket (i) specifically states "out KC 69-62X" (JO Ref. 67, p. 32), (ii) prints the Kansas City purchase weight of "19160" pounds (JO Ref. 66, p. 32), and (iii) shows "22 hd Strs" opposite that printed weight (JO Ref. 68, p. 32). The scale ticket is a complete fraud. It was, undoubtedly, dummied up on October 6, 1978, the same date of the Graf invoice. But it is, nonetheless, a complete fabrication.

Here, again, if the court wonders how respondent could have been so incredibly careless (or stupid) as to pick the 22 steers in Kansas City Lot No. 69, weighing 19,160 pounds, as the basia for his cover-up, he obviously did not know (or guess) when he dummied up the scale ticket (that "locked" him into Lot No. 69) that

his bookkeeper would record "KC 22 # 69 19160" on a sales invoice to another customer on the same day! That was not her general practice. In fact, out of all the sales invoices prepared by Mrs. Manson that appear in this record, the one showing "KC 22 #69 19160" is the *only* invoice that shows any purchase lot numbers for the animals invoiced to any customer.

b. The Worksheet for Transaction 4 Shows that the 22 Steers Purchased by Respondent in Kansas City on October 5, 1978, as Lot No. 69 Weighing 19,160 Pounds Went to Graf, but the Kansas City Invoice for Lot No. 69 Shows that They Were Holstein Steers, Which Respondent Admits Would Not Have Been Sent to Graf.

The Kansas City purchase invoice for Lot No. 69 for 22 steers weighing 19,160 pounds shows at the top, following "NO. 69," that the invoice is for "HOL. STRS" (JO Ref. 28, p. 30). Respondent admits that he would not have sent Holstein steers to Graf. He testified (Tr. 324):

> A. I see one thing here right now. I think we have a misprint here or something. I see where we have a wrong number because I see the number 69 as Holstein steers. I am quite sure, unless they have that Holstein steer label wrong that would not have went to Mr. Graf because that would be one thing that would be very much out of place.

Since there is no basis for disputing the documentary evidence on the Kansas City invoice to respondent for Lot No. 69, this is another "smoking gun," showing that the 22 steers weighing 19,160 pounds in Lot No. 69 were not combined with 33 other steers to make up the 55 steers shipped to Graf in Transaction 4.

Furthermore, as shown in § I(C)(2)(a), immediately above, when respondent sold the 22 steers weighing 19,160 pounds from Lot No. 69 to another customer, as part of 37 head, on October 6, 1978, the same day that he sold the 55 steers to Graf in Transaction 4, he invoiced the 37 head to the buyer in Pleasant Hill as "HOL. STRS" (JO Ref. 74, p. 54). Hence respondent's own invoice to his customer in Pleasant Hill confirms what the Kansas City invoice shows, that the 22 steers were "HOL. STRS." And in respondent's words, sending Holstein steers to Graf "would be one thing that would be very much out of place" (Tr. 324).

The documentary evidence showing that the 22 steers in Lot No. 69 were Holstein steers, which respondent admits would not have

been sent to Graf, is another "smoking gun," which, standing alone, would compel me to infer that respondent's worksheet and scale ticket for Transaction 4, showing that Lot No. 69 was sent to Graf, are complete frauds, fabricated to cover up respondent's weight padding.

3. Two Strongest "Affirmative" Circumstances ("Smoking Guns") Showing that Respondent's Worksheet and Scale Ticket in Transaction 4 Were Fabricated.

The following two circumstances are strong, "affirmative" circumstances showing that Kansas City Lot No. 66, purchased by respondent on October 5, 1978, consisting of 55 steers weighing 45,350 pounds, was the lot sold to Graf the next day in Transaction 4, with exactly 3% "pencil weight" added. As shown above in § I(B), according to respondent's entire case, Lot No. 66 is completely irrelevant to Transaction 4, and was not sold to Graf. The "smoking guns" discussed in the next two subsections contradict that position.

Following these 2 additional "smoking guns," § I(D) contains 6 other "affirmative" circumstances leading me to infer that Lot No. 66 was sold to Graf, § I(E) contains 2 other "negative" circumstances leading me to infer that Lot No. 69 was not sent to Graf, and § I(F) contains 10 other miscellaneous circumstances leading me to infer that the worksheet and scale ticket were fabricated.

a. Respondent's Bookkeeper Wrote "Graf" in the Top Right-Hand Corner of the Kansas City Purchase Invoice for Lot No. 66, Which, According to Respondent, Was Not Sent to Graf.

This "smoking gun" is quite simple. Mrs. Manson, respondent's bookkeeper, wrote "Graf" in pencil on the top right-hand corner of the Kansas City purchase invoice for the 55 steers weighing 45,350 pounds purchased by respondent on October 5, 1978, as Lot No. 66 (JO Ref. 2, p. 22). Respondent's attorney has referred to Mrs. Manson's "distinctive feminine handwriting" (Respondent's Brief on Remand, filed April 2, 1984, at 24). A comparison of "Graf," as written in the upper right-hand corner of the Kansas City purchase invoice for Lot No. 66 (JO Ref. 2, p. 22), photocopied from respondent's records, with the word "Graf" written on her invoice to Graf (JO Ref. 9, p. 23), reveals quite clearly that both are written in Mrs. Manson's "distinctive feminine handwriting." This can be seen from the copies made of the original documents, but it is even

more discernible when the Hearing Clerk's original file is examined.

If the Kansas City Lot No. 66 invoice were irrelevant to Graf's transaction, why did Mrs. Manson write "Graf" on the Lot No. 66 invoice? This, again, is another documentary "smoking gun," contradicting the testimony of respondent and Mrs. Manson. This circumstance, standing alone, would lead me to infer that the 55 steers respondent purchased in Kansas City on October 5, 1978, as Lot No. 66 went to "Graf" on October 6, 1978, and that respondent's worksheet and scale ticket showing that Lot Nos. 69 and 62X were used in Transaction 4 were fabricated to cover up respondent's addition of exactly 3% to the purchase weight of Lot No. 66.

b. Respondent's Bookkeeper's "Estimate" of the "Raw Cost" of the Cattle in Transaction 4, Which She Wrote on Respondent's Carbon Copy of the Invoice to Graf, Is $28,207.71, the Exact Price Respondent Paid for Lot No. 66, Which Respondent Contends Is Irrelevant to the Graf Transaction.

Respondent paid $28,207.71 for the 55 steers purchased at Kansas City on October 5, 1978, as *Lot No. 66* (JO Ref. 8, p. 22). That identical figure, "28,207.71," was written by Mrs. Manson on the bottom left-hand corner of the invoice to Graf in Transaction 4 (JO Ref. 19, 20, p. 23).

In 12 of the 14 transactions involved in this case, including Transaction 4, respondent's carbon copy of his invoice to the customer shows a figure written in the bottom left-hand corner which is exactly the same as the price respondent paid for the identical number of livestock, usually the day before (but on one occasion the same day, and on two occasions 2 days before) (see § XII(D), *infra*).

Referring to her bookkeeping system, in general, Mrs. Manson testified that the figure is "[m]y estimate of what is in those cattle" (Tr. 137). Although she was not asked specifically with respect to the figure of 28,207.71 shown at the bottom left-hand corner of the invoice to Graf in Transaction 4 (JO Ref. 19, 20, p. 23), she repeated her general testimony with respect to seven of the individual transactions. For example, with respect to the identical figure shown at the bottom of the invoice in Transaction 1, she testified, "That is,

again, my personal figure, to try to keep track of how much that particular load cost" (Tr. 143).[21]

The figure of "28,207.71" is clearly visible on RX 28, which is respondent's actual carbon copy of the invoice that was introduced into evidence by respondent. (If necessary, the Hearing Clerk's original file containing RX 28 can be made available to the court.) A portion of the figure is visible on CX 4, p. 1 (JO Ref. 20, p. 23). The "207.71" in the middle is somewhat legible. Mr. Gentry, one of complainant's investigators, testified that he added the figure in the border of CX 4, p. 1 (JO Ref. 19, p. 23), "to show what the amount is that is on the actual exhibit that is visible on film that was taken of this document on George Saylor's records" (Tr. 11).

Since Mrs. Manson entered the "raw cost" figure at the bottom of her copy of the *invoice* to Graf, which was allegedly *prepared from the worksheet,* if she had actually prepared the invoice from the worksheet, as claimed, she would have had before her the information that the 55 steers sold to Graf came from Lot Nos. 69 and 62X, not Lot No. 66. The cost to respondent of the 55 steers allegedly taken from Lot Nos. 69 and 62X is shown on the worksheet for Transaction 4 as $26,828.40 (JO Ref. 57, p. 32) (see § I(E)(2), *infra*).

Instead of using the "raw cost" figure shown on the worksheet, or calculating her own "raw cost" figure from Lot Nos. 69 and 62X,[22] Mrs. Manson entered on her copy of the invoice to Graf in

[21] Although Mrs. Manson explained that the *reason* she wanted to keep track of how much the particular load cost was so that, at the end of the month, she would know the amount of money that was in the cattle *in inventory*, which I do not accept (see § XIII(D), *infra*), the *reason* why she wants to know the "estimated" "raw cost" of the livestock in the particular load is not important here. It is only important here that the figure is admittedly her bookkeeping method of keeping track of the "estimated" "raw cost" of the livestock involved in each particular transaction. (In the other transactions, where relevant, I rely on the inference that Mrs. Manson wrote the cost estimates on the invoices to keep track of the *exact* cost of the livestock in the transaction, but in view of the massive evidence in Transaction 4, and the fact that the cost "estimate" is useful here to show that Lot No. 66 was used to ship to Graf, I am omitting that additional argument in Transaction 4.)

[22] It takes only a few seconds to approximate the raw cost of the 55 steers allegedly comprised of Lot Nos. 69 and 62X. With a pocket calculator, enter 33 ÷94 ×$47,686.08 (the cost of the 94 steers in Lot No. 62X (JO Ref. 47, p. 31)) + $9,907.19 (the cost of the 22 steers in Lot No. 69 (JO Ref. 31, p. 30)), and the calculator will show 26,648.046 (which rounds to $26,648.05). For a more precise determination, attempted (with a $2.33 error) on the worksheet, you would divide the alleged Pittsfield weight of the 33 head (26,595), plus their prorated shrink (955), for a total of 27,550, by the invoice weight of the 94 head (77,650), and multiply by the invoice price ($47,686.08), which equals $16,918.88. That is $2.33 less than the worksheet figure of 16,921.21 (JO Ref. 54, p. 32). Adding that to the invoice price of Lot No. 69,

Continued

Transaction 4 the exact cost figure shown on respondent's purchase invoice for Lot No. 66. This is another "smoking gun." This circumstance, standing alone, would lead me to infer that the 55 steers in Lot No. 66 were shipped to Graf in Transaction 4.

Three notations on the documents discussed above, that have not been relied on in respondent's briefs, should, nonetheless, be mentioned here. First, the notation on the invoice to Graf, "Weighed up at K.C." (JO Ref. 16, p. 23), was added in pencil by Mrs. Manson to respondent's carbon copy of the invoice (Tr. 253-54), but does not appear on the original invoice sent to Graf (CX 4, p. 2). Mrs. Manson testified that it "doesn't have anything to do with Mr. Saylor's sale weight" on the invoice (Tr. 253-54).

Second, the words "10 lites off—10 Heavys Replaced" (JO Ref. 7, p. 22) on the Lot No. 66 invoice are written in pencil on the bottom left-hand corner of the invoice. The record does not show who wrote this on the invoice, or whether it was written at Kansas City or Pittsfield.

Respondent does not handle livestock at Kansas City after he purchases them, but, rather, pays the Kansas City Livestock Order Buying Company to pen the cattle and load them out for him (see § I(C)(1)(a), *supra*). Miss Evans, Office Manager and Bookkeeper for Kansas City Livestock Order Buying Company, who personally handled respondent's account (Tr. 28-30), told Mr. Riley, one of complainant's investigators, that, on occasions, some animals would be added or subtracted from respondent's lots, without any "catch weight" scale tickets. She would use "average weights when subtracting from a lot of cattle or adding to a lot of cattle" (Tr. 30). It is possible that she made the notation on Lot No. 66.

Considering the notation by itself, without reference to any of the other facts in this case, and recognizing that it is a short-hand notation, rather than a grammatically correct sentence, the notation could, theoretically, mean (i) that 10 light steers were removed (leaving 45 head) and 10 heavy steers were replaced with lighter steers, (ii) that 10 light and 10 heavy steers were removed, each replaced by 10 average steers, or (iii) that 10 light steers were replaced by 10 heavier steers.[23]

$9,907.19 (JO Ref. 31, p. 30), equals $26,826.07, which, again, is $2.33 less than the cost figure of 26,828.40 shown on the worksheet (JO Ref. 57, p. 32). (Note, the figure of 16,921.21 (JO Ref. 54, p. 32) is entirely legible on the Hearing Clerk's copy, but the "1" at the beginning does not show on the reproduced copy in this decision.)

[23] A similar notation on a Kansas City invoice states "−3 lites" "+3-Hy" (RX 47). This would be a more appropriate notation to express the third interpretation set forth above.

I infer that the second interpretation is correct, in view of the documentary evidence showing that the trucker was paid for hauling 45,350 pounds, the exact number of pounds stated on the invoice (see § I(D)(1)-(2), *infra*).

In any event, however, respondent does not contend that the increased weight in this transaction resulted from 10 light steers being replaced with 10 heavy steers but, rather, that these 55 steers were not used at all in Transaction 4. Hence, this circumstance does not support respondent's claim as to Transaction 4.

The third notation is even more ambiguous than the one just discussed. The Kansas City invoice for Lot No. 66 shows "Shipped to Willrett," or something similar to that (writing not entirely legible) (JO Ref. 3, p. 22). Neither respondent nor his attorney has ever relied on this as showing that Lot No. 66 went to a different customer, and there is no explanation in the record, in this respect. The record contains many invoices from Kansas City Livestock Order Buying Company, some of which show the name of the customer after "Shipped to." However, on some, the "Shipped to" line is left blank (RX 1, 11, 30, 52, 63); on others, it reflects the name of a city (RX 13, 24, 25); and on one it reflects the name of the trucker (RX 9).

I have no basis for even guessing the meaning of "Willrett," or whatever the name is. But whatever it means, Mrs. Manson, who should know what it means, if anything, still wrote "Graf" on this (Lot No. 66) invoice (§ I(C)(3)(a), *supra*), and (as shown above in this subsection) she still used the purchase price of this (Lot No. 66) invoice as her "estimate" of the "raw cost" of the 55 steers shipped to Graf in Transaction 4. In addition, as shown in § I(D)(1)-(2), *infra*, she used the exact weight of this (Lot No. 66) invoice to pay the trucker in Transaction 4. Her documentary assurance that Lot No. 66 was used in Transaction 4 is good enough for me! In addition, we have the "smoking guns" discussed above, showing that respondent's claim, that Lot Nos. 69 and 62X were used in Transaction 4, is completely false.

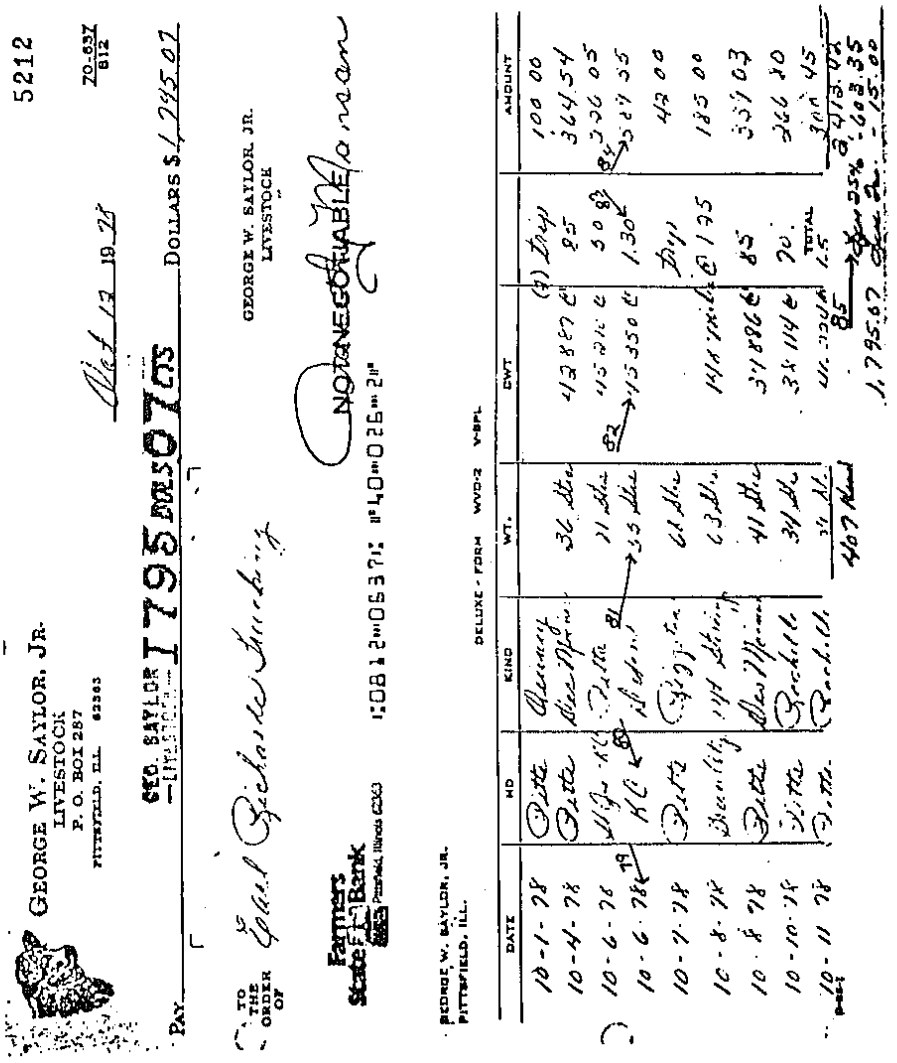
Furthermore, respondent and his attorney knew that complainant contends that Lot No. 66 was used in Transaction 4. That is, the complaint (¶ II) alleges that respondent's purchase weight in Transaction 4 was "45,350" pounds, the exact weight of Lot No. 66. If the notations "10 lites Off—10 Heavys Replaced," or "Shipped to Willrett," gave any support to respondent's case, respondent would have explained the significance of those notations. For this reason, as well as those discussed above, I attach no significance to the two notations.

D. Six Additional "Affirmative" Circumstances on Which I Base My Inference that the 55 Steers Sold to Graf on October 6, 1978, Were the Same 55 Steers Purchased by Respondent the Day Before in Kansas City as Lot No. 66 Weighing 45,350 Pounds (to Which He Added Exactly 3% by Pencil).

1. Respondent's Bookkeeper's Check Stub Shows Payment to the Trucker for Hauling 55 Steers Weighing 45,350 Pounds (the Exact Weight of the 55 Steers Purchased by Respondent in Kansas City as Lot No. 66) from Kansas City to Dixon, Illinois (Graf's Address), on October 6, 1978.

Respondent's bookkeeper's check to Earl Richards Trucking dated October 12, 1978, and accompanying check stub are reproduced on the next page (CX 4, p. 8).

Respondent's Check and Check Stub (CX 4, p. 8)



5212

GEORGE W. SAYLOR, JR.
LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILL. 62363

70-637
812

Oct 13 19 78

PAY GEO. SAYLOR 1795 DOLLARS $1,795.07

TO THE ORDER OF

GEORGE W. SAYLOR, JR.
LIVESTOCK

NOT NEGOTIABLE

Farmers State Bank
Pittsfield, Illinois 62363

⑆081203715⑈ 1⑈0 26⑈ 2⑈

GEORGE W. SAYLOR, JR.
PITTSFIELD, ILL.

DELUXE - FORM WVD-2 V-BPL

DATE	NO	KIND	WT.	DWT		AMOUNT
10-1-78	Butts	Alamarg	36 Hd	13 850	(4) Drgs	100 00
10-4-78	Butts	Blue Mpm			95	364 54
10-6-78	Hfgs	Butts	11 Hd	15 350	5 08	3 36 05
10-6-78	KC	Hfgs	35 Hd	13 350	1.30	3 217 35
10-7-78	Butts	Gilts	61 Hd		Drgs	42 00
10-8-78	Sheep	Hfgs	63 Hd	14 14	1 75	185 00
10-8-78	Butts	Blue Mpm	41 Hd	31 886	85	3 337 03
10-10-78	Butts	Rocks	34 Hd	34 114	70	3 166 20
10-11-78	Butts	Rocks	35 Hd		TOTAL 1.5	3 011 45
			467 Head			9,413.02
					85 → 35%	3,294.55
						6,118.47
						1,795.07

Earl Richards, of Earl Richards Trucking, transported the 55 steers involved in Transaction 4 to Graf on October 6, 1978 (JO Ref. 17, p. 23; and see § I(D)(2), *infra*). Mrs. Manson's check stub for her payment to Earl Richards Trucking for Transaction 4 shows payment of $589.55 (JO Ref. 84, p. 68) for hauling 55 steers (JO Ref. 81, p. 68), weighing 45,350 pounds (JO Ref. 82, p. 68), from Kansas City to Dixon, Illinois (Graf's address) (JO Ref. 80, p. 68; JO Ref. 10, p. 23) on October 6, 1978 (JO Ref. 79, p. 68), at $1.30 per cwt (JO Ref. 83, p. 68) (453.50 ×$1.30 = $589.55).

The weight of 45,350 pounds on the check stub (JO Ref. 82, p. 68) is the exact weight of the 55 steers purchased by respondent in Kansas City on October 5, 1978, as Lot No. 66 (JO Ref. 6, p. 22). I attach no weight to the fact that Mrs. Manson shows Kansas City as the origin and Dixon as the destination on this *check stub*, without showing Pittsfield, since other check stubs by Mrs. Manson, in transactions in which complainant concedes the animals passed through Pittsfield enroute to the purchaser, similarly do not show Pittsfield.

But I attach at least some (not decisive) weight to the weight figure shown on this check stub, *viz.*, 45,350 pounds, the exact purchase weight of Lot No. 66, which respondent, Mrs. Manson, the worksheet and scale ticket contend was totally irrelevant to Transaction 4. This weight figure (of Lot No. 66) was of importance both to respondent and the trucker in Transaction 4, since it was the weight used to compute the trucker's compensation.

Here, again, Mrs. Manson's documentary evidence is contrary to her testimony (and that of respondent, and the worksheet and scale ticket) that Lot No. 66, weighing 45,350 pounds, is totally irrelevant to Transaction 4.

It should be noted that my reliance here on the weight figure of 45,310 pounds is not contrary to the court's observation that the billing differences would have been *de minimis* where respondent claims that the loads he purchased for customers were brought to Pittsfield, and a few animals were substituted, increasing the weight (723 F.2d at 583).

Here respondent contends that Lot No. 66 was totally irrelevant to Transaction 4, that none of the animals in Lot No. 66 were used in Transaction 4, and that all of the animals used in Transaction 4 came from Lot Nos. 69 and 62X. In view of that contention, I attach at least some weight to the fact that Mrs. Manson paid the trucker in Transaction 4 based on the exact weight of the allegedly irrelevant Lot No. 66. The weight that I give this circumstance is increased when this circumstance is viewed in the light of the trucker's (Earl Richards') testimony (see § I(D)(3), *infra*).

2. The Weight Shown on the Trip Sheet for Transaction 4, Written in Respondent's Bookkeeper's Handwriting, is 45,350 Pounds, the Exact Weight of the 55 Steers Purchased by Respondent in Kansas City as Lot No. 66.

The trip sheet for Transaction 4, presumably written in the main by Earl Richards, of Earl Richards Trucking, is reproduced on the next page (CX 4, p. 7).

Transaction 4 Trip Sheet (CX 4, p. 7)

TRIP SHEET

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE: (217) 285-6186 (217) 285-4011

Date 10-6-78 Pro

Driver Earl

Co-Driver's Name

CONSIGNEE Hrel Cattle Co SHIPPER Kansas City Smith Tractor No. 2

DESTINATION Olyon, Ill. ORIGIN Kansas City Mo. Trailer No.

Quantity	Description	Weight		OFFICE USE
55	#2853 / (K.C.) 86	87 → 45350	@ 130	Rev.
			88 → 589.55	%
				Amt.

MILES RUN IN FOLLOWING STATES ON THIS TRIP:

MISSOURI LOADED 195
EMPTY
ILLINOIS LOADED 335
EMPTY 340

LOADED
EMPTY
LOADED
EMPTY

LOADED
EMPTY
LOADED
EMPTY

LOADED
EMPTY
LOADED
EMPTY

This trip sheet unmistakably relates to the Transaction 4 invoice to Graf Cattle Company, Dixon, Illinois, since the invoice number of the Transaction 4 invoice, #2853 (JO Ref. 18, p. 23), is shown on the trip sheet (JO Ref. 86, p. 71). The weight shown on this trip sheet is 45,350 pounds (JO Ref. 87, p. 71). As shown in the preceding subsection, this is the exact weight of the 55 steers purchased by respondent at Kansas City as Lot. No. 66 on October 5, 1978.

Moreover, the weight figure of 45,350 pounds is written in Mrs. Manson's "distinctive feminine handwriting." This is quite obvious if the "4," "5s," and "3" are compared with the same digits in Mrs. Manson's invoice to Graf in Transaction 3, reproduced on the next page (RX 22).

Transaction 3 Invoice Copied From Respondent's Records (RX 22)

GEORGE L. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

SOLD TO

DATE 19

NO.	KIND	WEIGHT	PRICE	AMOUNT
115	KC. Cal	45710	63.59	29066
	Hot Wt 297#			
				29 110

Respondent's Exhibit #22

#2824

28,060.42

Signed

WE APPRECIATE YOUR PATRONAGE

This circumstance is closely akin to that set forth immediately above in subsection I(D)(1). It is another bit of documentary evidence, generated by Mrs. Manson on the trip sheet, contrary to her testimony (and that of respondent) that Lot No. 66 was totally irrelevant to Transaction 4.

3. Earl Richards, Truck Driver for Transaction 4, Filled Out a Single Trip Sheet from Kansas City to Dixon, Illinois. He Testified that if the Livestock Had Been Sorted and Reweighed in Pittsfield, a New Trip Sheet Would Have Been Made Out Paying Him on the New Weight.

The trip sheet for Transaction 4, most of which is in Earl Richards' handwriting, shows a single trip, with "Origin Kansas City, Mo.," "Destination Dixon, Ill," and weight "45350" (§ I(D)(2), immediately above). The court states (723 F.2d at 583):

> Nothing in the record explains why the USDA found the truckers' documents to be so reliable as to be fully dispositive with no discussion of other evidence. No testimony indicated that all truckers (or these truckers in particular) keep the sort of records the USDA assumes they do. We cannot uncritically accept the USDA's unsupported assertion that the truckers' invoices and trip sheets are conclusive in the face of the argument that the billing differences for the increased weight and travel to Pittsfield would have been *de minimis* and therefore the Pittsfield travel would not necessarily have been recorded.

First, as emphasized in this decision (but not in the original decision), I do not find the truckers' documents dispositive (see note 5, p. 8). In fact, I give *no* weight to trip sheet entries *by truckers* (as distinguished from trip sheet entries by Mrs. Manson, or truckers' affidavits or testimony), except for the trip sheet involving this transaction. And I give this trip sheet weight only because of the testimony of Earl Richards, as to *his* practice. (And even here, the weight given to this trip sheet is *de minimis* compared to the weight given to the "smoking guns," discussed above.)

The trucker who hauled this load, Earl Richards, testified that if the cattle had been sorted and reweighed in Pittsfield, he would have been paid on the new weight after it was sorted. Specifically, he testified (Tr. 96-97):

> Q. On what basis are you paid for your hauling for Mr. Saylor?

A. We got paid by the weight we hauled.

Q. . . . Can you describe for us the accounting record that is used to determine the amount you are paid?

A. We got paid so much a hundredweight.

Q. Do you use trip sheets?

A. Yes.

Q. What information appears on those trip sheets?

A. How many heads you had on, how much weight, the destination where you picked them up and the destination.

Q. Are there any occasions when you hauled catted [cattle] for Mr. Saylor that they are unloaded and sorted and then reloaded?

A. Yes, in certain cases.

Q. On those occasions would a new trip sheet be made out?

A. Yes.

Q. And the next trip sheet would have on it whatever the new weight would be?

A. Yes, sir.

Q. Are there any occasions when you hauled livestock into Mr. Saylor's yards in Pittsfield and unloaded them and then reloaded the same cattle without resorting them?

A. Some cases, yes.

Q. Is it a fair summary of your testimony, then, that if the cattle are sorted and reweighed that you get paid on the new weight after it is sorted?

A. Yes.

Here we have categorical testimony by the trucker involved th if believed, completely supports complainant's position as to Tra action 4. In fact, if there were no other evidence, it would be suf cient, together with his trip sheet, to support a finding for co plainant as to Transaction 4.

Neither respondent nor his bookkeeper, Mrs. Manson, testifi that *Earl Richards* did not make out a new trip sheet when li stock was sorted and reweighed in Pittsfield. Moreover, an analy of the documentary evidence, although not conclusive, is at le

supportive of Earl Richards' testimony. The check stubs written by Mrs. Manson with respect to checks written to Earl Richards Trucking show payment for 17 trips, 11 of which (or *65%*) show *Pittsfield* as the *origin* (CX 4, p. 8 (6 of 9); CX 11, p. 11 (4 of 5); CX 13, p. 17 (1 of 3).

That is in sharp contrast to the same documentary evidence relating to all of the other truckers involved in the transactions in this proceeding, who had only 18 of 77 (or *23%*) of their payments showing *Pittsfield* as the *origin* (CX 1, p. 9 (0 of 3); CX 2, p. 14 (0 of 5); CX 3, p. 13 (1 of 7); CX 5, p. 9 (2 of 6); CX 6, p. 14 (3 of 6); CX 7, p. 9 (1 of 7); CX 8, p. 9 (0 of 7); CX 9, p. 9 (0 of 7); CX 10, p. 9 (3 of 4); CX 11, p. 8 (2 of 3); CX 12, p. 11 (1 of 4); CX 12, p. 14 (1 of 3); CX 13, p. 18 (1 of 3); CX 13, p. 20 (3 of 6); CX 14, p. 21 (0 of 6)).

Earl Richards filled out only a single trip sheet showing the transportation of 55 steers weighing 45,350 pounds from Kansas City to Dixon, Illinois (see § I(D)(2) immediately above). He testified that it was *his* practice to make out a new trip sheet, paying *him* on the basis of the new weight, *when livestock was resorted in Pittsfield*. Arguments in respondent's attorney's briefs as to what truckers *would likely do* when livestock is sorted in Pittsfield do not meet the testimony of Earl Richards as to what *he does* when livestock is sorted in Pittsfield.

Nothing in the record leads me to disbelieve *Earl Richards'* testimony that *he* was paid on new weights with a new trip sheet *when livestock was sorted and reweighed in Pittsfield*. The ALJ, who saw and heard the witnesses testify, believed the testimony of Earl Richards. He stated, "One [trucker, obviously Earl Richards] confirmed that if a weight change was made, a new trip sheet and charge should [or, more accurately, would] be made for the second leg of the trip" (ALJ's Decision and Order on Remand at 19).

Hence Earl Richards' testimony, uncontradicted by any other testimony or records relating to *his* trip sheet practice, would be sufficient in itself to support a finding for complainant as to Transaction 4. But the other evidence as to Transaction 4 is so overwhelming that this trip sheet evidence is insignificant, in comparison.

One final point should be emphasized here. Earl Richards did not testify that a new trip sheet was made out on those occasions when he hauled "livestock into Mr. Saylor's yards in Pittsfield and unloaded them and then reloaded the same cattle without resorting them" (Tr. 97). Hence nothing in his testimony (or in his trip sheet) speaks to the alleged issue as to whether Earl Richards' truck stopped at Saylor's yards in Pittsfield with the 55 steers hauled from Kansas City enroute to Graf's pens in Illinois.

However, that is not an issue in this case. Whether Earl Richards' truck stopped in Pittsfield enroute to Graf's yards is totally irrelevant since even if his truck stopped in Pittsfield, the documentary evidence proves conclusively that what respondent says happened in Pittsfield (*i.e.*, the substitution of 22 steers from Lot No. 69 weighing 19,160 pounds and 33 of the 94 steers from Lot No. 62X) did not happen, and could not possibly have happened.

4. The Fact that Respondent's Invoice Weight to Graf Is Exactly 3% More than the Weight of 55 Steers Purchased the Day Before as Lot No. 66 Is, by Itself, and Considered Along with Respondent's Six Other Increases of Exactly 3% or 2%, Statistically Very Significant.

ıpondent's invoice weight to Graf, 46,710 pounds (allegedly re-
ıg from taking 55 steers from Lot Nos. 69 and 62X), is 1,360
ınds more than the weight of 55 steers weighing 45,350 pounds
ɹurchased the day before by respondent as Kansas City Lot No. 66 (46,710 −45,350 = 1,360). This is *exactly* 3% more than the purchase weight of Lot No. 66 (see § I(A), *supra*).[24]

Looking solely at this transaction, we can determine the statistical probability of that occurring by happenstance by applying the "law of the case," *i.e.*, "[w]hat is sauce for the goose is sauce for the gander" (723 F.2d at 583). That is, if respondent's alleged mixture of 55 steers from Lot Nos. 69 and 62X happened, soley by chance, to be 3% over the purchase weight of the 55 steers in Lot No. 66, purchased the day before, the mixture could just as easily, by chance, have been 3% less than the purchase weight of Lot No. 66. Specifically, instead of the mixture being 1,360 pounds heavier than 45,350 pounds, it could just as easily have been 1,360 pounds lighter than 45,350 pounds. (Respondent testified that he would have as many loads end up lighter than the purchase weight as heavier (Tr. 358-59)).

Using those two limits as the outer limits of reasonable happenstance, the weight of respondent's alleged mixture could have been anywhere from 43,990 (45,350 −1,360 = 43,990) to 46,710 pounds (respondent's invoice weight to Graf). This is a range of 2,720 pounds (46,710 −43,990 = 2,720; an easier method of computing the same figure is to multiply 1,360 by 2). Since respondent's live-

[24] "Rounding" the weight increase (calculated by multiplying the purchase weight by exactly .03) to the nearest 5 pounds does not make the result only "approximately" 3%, as suggested by respondent (see § I(A), *supra*).

stock scale weighs only to the nearest 5 pounds, that means that, by happenstance, respondent's alleged mixture could have been any one of 545 different weights (2,720 ÷5 = 544 + 1 = 545).[25]

Hence, based on a reasonable assumption as to the outer limits of what could have occurred by happenstance, there was only 1 chance in 545 that respondent's alleged mixture of 55 steers would result in a weight *exactly* 3% greater than the purchase weight of the 55 steers in Lot No. 66.[26]

Since respondent admittedly only engaged in "approximately 300 transactions" during the relevant time period with all customers (Appeal from Judges Decision filed October 6, 1982, at 2), including many not involved in this case, respondent used up more than his statistical chance of arriving at a 3% increase in weight by happenstance in this one transaction alone. When the 3% increase in Transaction 4 is considered along with the 3% increase of 1,385 pounds in Transaction 7 (at odds of 1 in 555),[27] and the 3% increase of 2,770 pounds in Transaction 13 (at odds of 1 in 1,109),[28] the chance of all that occurring by happenstance in a total of 300 transactions is, statistically, too remote to be believable.

When we consider the increases of exactly 2% during the same time frame, 845 pounds in Transaction 2 (at odds of 1 in 339),[29] 535 pounds in Transaction 5 (at odds of 1 in 215),[30] 875 pounds in Transaction 6 (at odds of 1 in 351),[31] and 1,080 pounds in Transaction 14 (at odds of 1 in 433),[32] the chance of increases in those seven transactions of exactly 3% or 2% occurring by happenstance is so small as to make respondent's claim unbelievable, even if

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[25] If any reader is not familiar with such computations, take the simple example of Lot No. 66 consisting of one animal weighing 100 pounds, and respondent's invoice weight being 105 pounds, or a 5-pound increase. Applying a possible 5-pound decrease to the 100-pound weight would give a range from 95 to 105 pounds. To determine the possible number of scale weights that could result from this range, we would subtract 95 from 105, which equals 10, divide that by 5, which equals 2, and add 1, which equals 3. We can easily check that result by observing that the three possible weights would be 95, 100, and 105. The same result would be computed di- [illegible] increase by 2, dividing by 5, and

there were no other facts in the case but this statistical evidence (see § XII(A), *infra*).[33]

5. In Addition to Buying Livestock for His Inventory, Respondent Buys Particular Loads of Livestock to Fill Particular Orders for Customers, Giving Him the Opportunity to Pad Weights.

Respondent not only buys livestock to place in his inventory for later use, but he also buys many loads of livestock to meet specific orders of particular customers (§ XII(B), *infra*). Unlike the other circumstances discussed above, this circumstance, standing alone, is entirely innocuous. But this circumstance, together with the next, shows that respondent had the *opportunity* to commit the fraud alleged.

6. Respondent (i) Frequently Sorts Livestock at Pittsfield Purchased for a Particular Customer, and (ii) Frequently Purchases Livestock for a Particular Customer Without Sorting. This Presented the Opportunity for Fraud, Without Arousing Suspicion.

Respondent frequently sorts livestock at Pittsfield that he purchased for particular customers. On the other hand, he frequently purchases livestock for a particular customer and does not engage in any sorting (§ XII(C), *infra*). This practice afforded respondent the *opportunity* to add weight by pencil to those transactions in which he did not engage in any sorting at Pittsfield. Customers would not be suspicious because they saw him sort livestock on *other* occasions.[34] This circumstance, too, is innocuous, standing

[33] The statistical probability of these seven increases of exactly 2% or exactly 3% occurring in 300 transactions could be computed (based on the assumptions set forth above) by using the normal curve approximation to the binomial probability distribution formula (see Freund, *Modern Elementary Statistics* 153–54, 184–85 (3d ed. 1967) (Lib. of Cong. Catalog Card No. 66-29560)). That would require a computer to solve, with numbers as large as we have here. But anyone who has any familiarity with the laws of statistical probability can see at a glance that the odds against these *seven* increases of exactly 2% or 3% occurring by chance in only 300 transactions, when the odds against each occurrence are so remote, would be enormous. (Complainant should, in future cases, have a statistician with computer capability compute such odds.)

[34] Only one customer, Mr. Rodhouse, testified that he observed the sorting of the animals involved in this case (Transactions 11 and 12). In fact, he testified that in

Continued

alone, but it shows that respondent had the *opportunity* for engaging in the fraudulent activity found here, without arousing the suspicion of his customers.

E. Two Additional "Negative" Circumstances on Which I Base My Inference that the 22 Steers in Lot No. 69 Were Not Combined with 33 from Lot No. 62X to Ship to Graf in Transaction 4.

1. Respondent's Purchase Price for the 22 Steers in Lot No. 69, Weighing 19,160 Pounds, Was so Far Below the Price of the Steers in Lot No. 62X ($9.70 Per Cwt Less), and so Far Below the Purchase Price for the Steers Used in the Other 13 Transactions ($12.54 Per Cwt Less than the Average), that the Steers from Lot No. 69 Would Not Have Been of the Required, Uniform Quality.

The purchase price of the 22 steers in Lot No. 69, weighing 19,160 pounds, before commission, was $9,888.03 (JO Ref. 30, p. 30). Dividing the purchase price by the cwt gives the average purchase price of the steers, *i.e.*, $51.61 per cwt ($9,888.03 ÷ 191.60 = $51.61). On the other hand, the average purchase price of the steers in Lot No. 62X, which cost $47,608.43, before commission (JO Ref. 41, p. 31), for 77,650 pounds (JO Ref. 40, p. 31), from which 33 animals were allegedly sorted out and combined with Lot No. 69, was $61.31 per cwt ($47,608.43 ÷ 776.50 = $61.31), or $9.70 per cwt more than the price of the 22 steers in Lot No. 69 ($61.31 − $51.61 = $9.70).

This is an enormous difference in price, which demonstrates quite clearly to anyone familiar with livestock marketing that Lot Nos. 69 and 62X would not have been of uniform quality. Respondent concedes, and the evidence shows (see § XI, *infra*), that all of respondent's customers desired uniform quality.

Transaction 12, (i) he was present when the steers arrived, (ii) he assisted or supervised the removal of certain animals from the lot, and (iii) he received scale tickets (Tr. 49-53). His testimony as to the first salient point is contradicted (i) by the testimony of respondent, (ii) by the testimony of Mrs. Manson, and (iii) by documentary evidence (see § XVIII, *infra*). Obviously, his memory, 3 years after the fact, was faulty. In Transaction 11, discussed in § XVII(C), *infra*, he testified that he received scale tickets, but the documentary evidence shows the scale tickets were not fabricated until the next day. Penetrating analysis of Transaction 11 does not support respondent's claim that an "error" was made in dating.

Respondent's average purchase price for the animals alleged in the complaint, other than Transaction 4, was $64.15 per cwt.[35] Hence the 22 steers in Lot No. 69 were not only purchased for $9.70 per cwt less than the steers in Lot No. 62X, but, also, for $12.54 per cwt less than the average of all the other purchases alleged in the complaint ($64.15 −$51.61 = $12.54).

The relatively poor quality of the steers in Lot No. 69 is further indicated by the fact that respondent sold these 22 steers, along with 15 others, at an average price of $53.11 per cwt,[36] whereas the animals he sold to Graf in Transaction 4 were sold by respondent at $62.65 per cwt (JO Ref. 12, p. 23), or $9.54 per cwt more ($62.65 −$53.11 = $9.54).

This is another very compelling circumstance, which, standing alone, would cause me to infer that Lot No. 69 was not combined with 33 animals from Lot No. 62X to make up a uniform load for Graf in Transaction 4.

2. If Respondent Had Used the 22 Steers in Lot No. 69, Weighing 19,160 Pounds, and 33 of the 94 Steers from Lot No. 62X, to Ship to Graf in Transaction 4, Respondent's Commission on the 55 Steers Would Have Been About 16 Times the Agreed-Upon Commission.

Transaction 4 was one of the three transactions in which respondent was acting as a market agency buying livestock for Graf on commission. Mr. Graf's affidavit[37] states that the agreed-upon commission was "25¢/cwt" (CX 19, p. 5). Respondent conceded that his commission in the fall of 1978 was 25¢ per cwt. He testified (Tr. 302-03, 343):

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[35] Computed from respondent's purchase price for each transaction, which is set forth in the discussion of each transaction. The purchase prices are: Tr. 1, $63.23; Tr. 2, $64.55; Tr. 3, $61.85; Tr. 5, $60.44; Tr. 6, $69.03; Tr. 7, $63.27; Tr. 8, $59.00 and $62.42; Tr. 9, $75.51; Tr. 10, $63.20; Tr. 11, $64.37; Tr. 12, $65.82; Tr. 13, $65.76; Tr. 14, $59.64. The sum of the 14 purchase prices, other than Transaction 4 (there were two purchase prices in Transaction 8), is $898.09, which, divided by 14, equals $64.15.

[36] Computed from CX 20, p. 1, reproduced above in § I(C)(2)(a), *supra*. Respondent's invoice price for the 37 Holstein steers was $17,374.94 (JO Ref. 75, p. 54), which, when divided by the pounds (5,885 + 19,160 + 7,670 = 32,715), equals $53.11 per cwt ($17,374.94 ÷327.15 = $53.11).

[37] Mr. Graf was subpoenaed by complainant, but could not testify because of ill health. Respondent's trial attorney waived any objections to the admissibility of his affidavit (Tr. 365).

Q. Generally speaking, what charges have you made for dealing in livestock?

A. Generally, we take our expenses if we are bringing livestock straight through, in other words, we don't go to the trouble of going through the feed yards. Whatever the commission, which has varied over the years, we have tried to use the practice of $.25 a hundred back at this time; of course, it is higher now [December 3, 1981, the date of his testimony], plus whatever expenses we might have, which, sometimes, would be a small feed bill or maybe somebody helping you. Once in awhile we will have a guy help us and we will give him $1.00 a head, is kind of the principle of how, you know, plus whatever the cattle costs, you know.

* * * * * * *

Q. And in the fall of 1978, what was your commission?

A. If I recall correctly, it was still around a quarter. We used a quarter for several years.[38]

Respondent's average cost for the 55 animals allegedly sent to Graf, as stated on his worksheet, is $57 per cwt (JO Ref. 59, p. 32). The correct actual cost, which I computed from his worksheet,[39] is $57.43 per cwt and, therefore, I have given respondent credit for the higher amount. Although respondent was required by the regulations to show expenses, such as transportation costs and commission, separately on his accounting (9 CFR § 201.44), I have also given him credit for $1.27 per cwt, which would have produced $593.22 ($1.27 ×467.10 = $593.22), to cover his transportation cost of $589.55 (JO Ref. 84, p. 68).[40] This results in a total cost to re-

[38] Only respondent's attorney implies or suggests that respondent's commission in the fall of 1978 was higher than 25¢ per cwt. With typical lack of candor, he states (Appeal to Judicial Officer at 22):

> The complainant and the Administrative Law Judge also contend that Saylor fraudulently increased his commission rate above the $.25 hundredweight. The evidence on this charge is virtually nil. It appears that two of his customers remembered a conversation several years ago (i.e., 1972–1974) in which Saylor said that his commission or profit was $.25 per hundredweight. Over the years Saylor's commission rate (or profit) had to be increased as inflation, fuel costs, etc., increased. There is nothing unfair or deceptive in this.

[39] By dividing the total cost of the alleged mixture, $26,826.07 (see note 22, p. 63, *supra*), by the alleged weight, 46,710 pounds, *i.e.*, 467.10 cwt (JO Ref. 58, p. 32).

[40] For this analysis, I have not reduced the transportation cost by 25% (JO Ref. 85, p. 68), which is to respondent's advantage.

spondent, including transportation, of $58.70 per cwt ($57.43 + $1.27 = $58.70). Subtracting this from respondent's invoice price to Graf ($62.65) results in a commission of $3.95 ($62.65 −$58.70 = $3.95), which is 15.8 times the agreed-upon commission of 25¢ per cwt ($3.95 ÷$.25 = 15.8).[41]

Accordingly, if respondent had actually combined the 22 steers in Lot No. 69 with 33 from Lot No. 62X, as shown by his worksheet for Transaction 4, his commission on the 55 steers would have been outrageous. This is another circumstance indicating that respondent did not actually use the 22 steers in Lot No. 69 and 33 from Lot No. 62X to ship to Graf in Transaction 4.

F. Ten Additional Miscellaneous Circumstances on Which I Base My Inference that the 55 Steers Sold to Graf Cattle Company, Dixon, Illinois, on October 6, 1978, Were the Same 55 Steers Purchased by Respondent the Day Before in Kansas City as Lot No. 66 (to Which Respondent Added Exactly 3% to the Weight by Pencil), Rather than a Mixture of Lot Nos. 69 and 62X, as Claimed by Respondent, and that Respondent's Worksheet and Scale Ticket Were Fabricated to Cover Up His Fraud.

1. Respondent's Purchase for Graf Was on a Commission Basis. Sorting Is Inconsistent with Buying Livestock on Commission as an Agent.

As shown in the immediately preceding subsection (§ I(E)(2)), respondent bought livestock for Graf in Transaction 4 as an agent for 25¢ per cwt commission. Mr. Graf's affidavit states that he and respondent had the "understanding that Saylor was turning his weights and prices to me and charging me 25¢/cwt commission and adding in the cost of trucking to my pens" (CX 19, p. 6).

Since respondent was turning not only his weights, but also his prices, to Graf, it is inconsistent with such a transaction for respondent to engage in sorting activities. For example, when respondent allegedly sorted seven animals out of a load purchased for

[41] Even if respondent had $2 per head additional expenses (or $110 on 55 head), that would not have decreased his profit even by 25¢ per cwt ($.25 ×467.10 = $116.78). So with an additional $2 per head expense, his commission still would have been about 15 times the agreed-upon commission ($3.70 ÷$.25 = 14.8). Moreover, by not reducing the transportation cost by 25% (see JO Ref. 85, p. 68), respondent has been given credit for $147.39 in expenses that he did not actually spend (.25 ×$589.55 = $147.39).

Graf in Transaction 3, and substituted seven animals from his own inventory, respondent was not turning his prices on the seven animals substituted from inventory but, rather, was selling them as a dealer to Graf. (He could not "turn his price" to Graf when he bought the seven head earlier and fed them while they were in his inventory.)

Although the situation is not as obvious in Transaction 4, where respondent allegedly did not add any livestock from his inventory, but merely sorted 33 animals from a total of 94 purchased as Lot No. 62X, respondent was still engaging in sorting, which prevented the transaction from being a "clean-cut" transfer of purchase weights and purchase prices contemplated by the agency arrangement.

In addition, sorting was inconsistent with the 25¢ per cwt purchase agreement since there would not be enough profit in such a transaction to justify taking the animals to respondent's facilities at Pittsfield and sorting them.

Respondent's testimony, quoted in the preceding subsection, comes very close to admitting that, when respondent was buying livestock at 25¢ per cwt commission, the livestock went straight through without going through his Pittsfield feed yards. Specifically, he testified (Tr. 302–03; emphasis added):

> Q. Generally speaking, what charges have you made for dealing in livestock?
>
> A. Generally, we take our expenses *if we are bringing livestock straight through,* in other words, *we don't go to the trouble of going through the feed yards. Whatever the commission, which has varied over the years, we have tried to use the practice of $.25 a hundred back at this time*; of course it is higher now [December 3, 1981, the date of his testimony], plus whatever expenses we might have, which, sometimes, would be a small feed bill or maybe somebody helping you.

The fact that sorting livestock by respondent would have been totally inconsistent with the agreed-upon agency arrangement is another strong circumstance supporting my inference that respondent padded weights and engaged in an elaborate cover-up.

2. Graf Sorted His Own Livestock Received from Respondent, and Nearly Always Removed a Few Unsuitable Animals. There Is no Evidence that Graf Knew of or Approved of Respondent's Sorting of Livestock.

Graf was a dealer who resold the livestock purchased for him by respondent to other customers (CX 19, p. 5). Graf's affidavit states that when livestock purchased by respondent was delivered to him at Dixon, Illinois (CX 19, p. 6)—

> I had them unloaded in my pens so I could sort them up before delivering them to my customers. I would nearly always take off a few that would not suit the load.

Graf's practice of sorting his own livestock, and almost always taking off a few that did not suit his load, is consistent with what one would expect where livestock is bought on an agency basis with the agent's (respondent's) prices and weights turned to the principal (Graf) (see § I(F)(1), immediately above).

There is nothing in the record to suggest that Graf knew of, or approved of, respondent's sorting of livestock. Similarly, there is no evidence that Malcolm H. Gentry (no relation to complainant's investigator), the only other customer who purchased livestock from respondent on a commission basis (with respondent turning his weights and prices to Mr. Gentry in Transaction 5), knew of or approved of respondent's sorting of livestock.

Since most of respondent's customers knew of and approved of his sorting of livestock, it is very significant that there is no evidence that the two customers buying on a commission basis, where sorting would be inconsistent with the agency arrangement (see § I(F)(1), immediately above), knew of or approved of respondent's sorting of livestock.

Similarly, there is no evidence that Roger Jennings, the customer in Transaction 8, whose livestock was delivered to Emporia, Kansas (west of the purchase points, where geography would preclude any claim of sorting), knew of or approved of respondent's sorting.

Hence, as to the three customers where sorting would not be appropriate, Mr. Graf, Mr. Gentry and Mr. Jennings, there is no evidence that they knew of or approved of respondent's sorting. This is another strong circumstance supporting my inference as to respondent's weight padding and cover-up in Transaction 4.

3. Adverse Inference Drawn Against Respondent for Not Calling His Yardman Who Allegedly Weighed the Livestock on Arrival in Pittsfield.

As shown in § VIII, *infra*, I draw an adverse inference against respondent because he claims that the Pittsfield "in weight," or arrival weight, was taken by his yardman, who was not called as a witness by respondent. The yardman was the only person who, allegedly, could have given first-hand testimony that he weighed the 94 head from Lot No. 62X when they arrived in Pittsfield (which we know did not happen because all 94 head never came to Pittsfield), and that their weight was the weight given to respondent on a slip of paper.

4. Respondent's Claimed Method of Printing Scale Tickets, that Do Not Show the Actual Weight of the Livestock Being Weighed but, Rather, Include Shrink, Would Have Been Such an Outrageous Violation of Law that His Testimony that He Engaged in that Practice Is Not Believable.

The first printed weight on the scale ticket for Transaction 4 is "19,160" pounds (JO Ref. 66, p. 32). This is the exact Kansas City purchase weight of the 22 steers purchased by respondent as Lot No. 69 (JO Ref. 29, p. 30). Hence, according to respondent's version of the facts, the printed scale ticket weight of 19,160 pounds includes about 638 pounds of shrink (assuming the same 29-pound-per-head alleged shrink as respondent claims for Lot No. 62X (29 $\times 22 = 638$)).

Mrs. Manson testified that the 19,160-pound weight figure represents the buying weight in Kansas City, and that they only showed shrink on the loads where sorting was done, as in Lot No. 62X (Tr. 252–53). As shown in § VII(C)(3), *infra*, printing on a scale ticket that does not reflect the actual weight of livestock on the scale at the time but, rather, includes transit shrink, would be such an outrageous violation of law that respondent's claim that he engaged in such a practice is not believable. (I assume that he made such an absurd claim only because he feared that, otherwise, he would be found guilty of the more serious violation of weight padding.)

5. Inference Drawn Against Respondent for Failing to Print Scale Ticket for Pittsfield Arrival Weight of 94 Steers in Lot No. 62X, Which Was Necessary to Support His Transfer Weights.

Respondent concedes that a scale ticket was not printed for the alleged arrival weight of the 94 steers in Pittsfield (which we know did not all come to Pittsfield). Since respondent was selling the 55 steers to Graf on respondent's purchase weights, *i.e.*, respondent was transferring his weights to Graf, respondent was required by the regulations to print scale tickets supporting his transfer weights. His failure to do so would have been such a blatant violation of law that his story that the livestock was actually weighed, but that scale tickets were not printed, is not believable (see § VII(C)(4), *infra*).

6. Inference Drawn that Scale Tickets for Transactions 1-7, and 9 Were Not Furnished to Complainant's Investigators on January 29, 1979, When Requested, Because They Would Have Prompted the Investigators to Look for Non-Existent Worksheets.

As shown in § IX(A), (B), *infra*, on January 29, 1979, complainant's investigators requested all of respondent's records relating to his transactions during the relevant time period. (This is, in effect, admitted by Mrs. Manson, who testified that she gave all the scale tickets and worksheets to the investigators on January 29, 1979). The ALJ and I have accepted Mr. Gentry's testimony that the scale tickets for Transactions 1-7, and 9 were not furnished to complainant's investigators. (There were no scale tickets in Transaction 8.)

All of the scale tickets for the transactions prior to Transaction 10, which were prepared prior to Mr. Kostelecky's mid-October 1978 visit to respondent, would have alerted the investigators to ask for worksheets. None of those scale tickets were furnished to the investigators.

All of the scale tickets furnished to the investigators, *i.e.*, for Transactions 10-14, were prepared after Mr. Kostelecky's mid-October 1978 visit. They were all "sanitized," so that none would prompt an investigator to ask for worksheets.

The differences between the scale tickets that were furnished to the investigators on January 29, 1979, and the scale tickets that were not furnished at the same time, lead me to infer that the

scale tickets for Transactions 1–7, and 9 were not furnished because they would have prompted the investigators to ask for nonexistent worksheets (see § IX(C), *infra*).

7. Inference Drawn that No Worksheets Were Furnished to Complainant's Investigators When All Respondent's Records Were Requested on January 29, 1979, Because They Were Not Then in Existence.

As shown in § IX, *infra*, on January 29, 1979, complainant's investigators requested all of respondent's records relating to his transactions during the relevant time period. Mrs. Manson testified that she gave all of the worksheets (and scale tickets) to the investigators at that time. Mr. Gentry testified that none of the worksheets were given to them (and only the scale tickets for Transactions 10–14). The ALJ and I believe Mr. Gentry's testimony. I infer that the worksheets were not given to the investigators because they were not then in existence (see § IX(D), *infra*).

8. In All of the Alleged Reweighing Transactions, the Number of Animals Shipped to the Customer (Allegedly after Various Sorting or Mixing Occurred) Always Exactly Equaled the Number of Animals Respondent Had Just Purchased, Notwithstanding the Fact that Customers Bought in Approximate, Rather than Exact, Amounts.

Respondent's customers did not specify the exact number of animals desired (which is not practical in view of the mechanics of livestock marketing), but, rather, gave respondent the approximate numbers desired (§ XII(E), *infra*). Nonetheless, the number of animals respondent shipped to the customers in the alleged reweighing transactions, allegedly after various sorting or mixing occurred, always exactly equaled the number just bought by respondent. This is another circumstance supporting the inference that respondent was actually adding weight by pencil to the original purchase weight, and fabricated scale tickets and worksheets to cover up his fraud.

9. The Cumulative Effect of Suspicious Circumstances.

As shown in § XII(G), *infra*, where a case is proved by circumstantial evidence, suspicious circumstances in one transaction are

viewed in the light of other suspicious circumstances in the same transaction, and suspicious circumstances in other transactions. Hence the suspicious circumstances have a cumulative effect, which must be taken into consideration when each transaction is considered.

10. The Administrative Law Judge, Who Saw and Heard the Witnesses Testify, Did Not Believe the Testimony of Respondent or His Bookkeeper, in Part, Because of Their Demeanor.

The fact that the ALJ did not believe the testimony of respondent or his bookkeeper, based on contradictions, inconsistencies and their demeanor, is a strong circumstance which, by itelf, has frequently been held decisive by reviewing courts (unless the ALJ's findings are hopelessly incredible, or flatly contradict a law of nature or undisputed documentary evidence) (see § XII(H), *infra*).

G. Under Assumptions Much Too Favorable to Respondent, the Statistical Probability of Just Five of the Events Which Prove Respondent's Guilt Occurring by Chance in Transaction 4 Is Less than 1 in 100,000.

Taking just five of the events referred to above, we can, by making reasonable assumptions as to how often they would have occurred by chance, and using the laws of statistical probability, estimate the likelihood that the five events came together, by chance, in Transaction 4, to make an innocent dealer look guilty.

First, if respondent were innocent of weight padding and fabrication of the worksheet and scale ticket in Transaction 4, the entry on Kansas City Lot No. 62X, which was used to load out the livestock, showing that 30 head went to Swift at Omaha and that only part of the load went to Pittsfield, was wrong. That would have been a colossal error by the Kansas City bookkeeper, much less likely to occur than a simple arithmetical error. Moreover, that colossal error would have had to have been corrected in time to send all 94 head to Pittsfield. (The record, of course, shows no documentary evidence that this entry was an error, or that, if so, it was corrected.)

I doubt whether a responsible bookkeeper would make such a colossal error often (or that, if she did, it would have been corrected in time to have respondent's yardman weigh all 94 head in Pittsfield). I would estimate the chance occurrence of such events at less than 1 in 100, but I will assume, for this computation, that such an

error would occur (and be corrected in time) in 1 out of every 10 invoices handled by the Kansas City bookkeeper.

Second, if respondent were innocent, the same Kansas City bookkeeper erroneously entered "HOL. STRS" on the invoice for Lot No. 69. Here, again, I would estimate such an error would not be made in more than 1 in 100 invoices, but I will assume, again, that she makes such errors in 1 invoice out of every 10.

Third, if respondent were innocent, Mrs. Manson, respondent's bookkeeper, made a colossal error when she showed on the invoice to another customer (made on the same day as the Transaction 4 invoice) that the 22 steers in Lot No. 69, weighing 19,160 pounds, were used as part of a shipment of 37 "HOL. STRS" to that customer. I doubt whether she shows the same lot sold to two different customers on two different invoices prepared the same day as often as 1 time in 100, but I will again assume she makes such colossal errors in 1 transaction out of every 10.

Fourth, if respondent were innocent, Mrs. Manson was completely wrong when she wrote "Graf" on the Kansas City purchase invoice for Lot No. 66, weighing 45,350 pounds, which she and respondent contend was totally irrelevant to the Transaction 4 shipment to Graf. (I will include as part of this same "mistake," rather than as a separate mistake, Mrs. Manson's writing the cost of Lot No. 66 on her invoice to Graf in Transaction 4.) Here, again, I doubt whether Mrs. Manson makes such mistakes (as distinguished from simple arithmetical errors) as often as 1 time in 100, but I will assume, for the purposes of this computation, that Mrs. Manson is so inept as a bookkeeper that she makes such serious blunders in 1 transaction out of every 10.

Fifth, I will assume that in 1 transaction out of every 10, the weight invoiced to a buyer is exactly 3% more (or similar even percentage) than the weight of the identical number of livestock just puchased by respondent.

Based on these assumptions (that each of these colossal errors or unusual events actually occur in 1 transaction out of every 10), which lean so far in respondent's favor that they are totally unrealistic, the odds under the laws of statistical probability of those five events occurring in a single transaction, by chance, are 1 in 100,000. If we add just one more circumstance, that 1 time in 10 respondent overcharges a commission customer about 16 times the agreed-upon commission, this would reduce the odds in Transaction 4 of these six events occurring by chance to 1 in 1,000,000.

The formula for computing the statistical probability of a number of independent events, *e.g.*, five, all occurring in the same transaction, by chance, where we know (or assume) the likelihood

of each event occurring by itself by chance, *e.g.*, 1 time in 10, is simply $1/10 \times 1/10 \times 1/10 \times 1/10 \times 1/10 = 1/100{,}000$. (With one more event at odds of 1 in 10, the statistical probability would be 1 in 1,000,000.) This formula can be found in any textbook relating to statistical probability, *e.g.*, Freund, *Modern Elementary Statistics* 115–16 (3d ed. 1967) (Lib. of Cong. Catalog Card No. 66–29560):

> To illustrate the general rule of multiplication, suppose we want to determine the probability of choosing two defective TV sets in succession from a shipment of 12 TV sets among which 4 are defective. Assuming equal probabilities for each selection, the probability that the first one is defective is $4/12$, and the probability that the second is defective *given that the first was defective* is $3/11$. (There are only 3 defectives among the 11 sets which remain after the first selection has been made.) Hence, the probability of choosing two defective sets in a row is $(4/12)(3/11) = 1/11$.[42]
>
> The general rule of multiplication can easily be extended to the occurrence of more than two events. In fact, the probability of the occurrence of several successive events can be obtained by multiplying the probabilities of the individual events, assuming in each case that all previous events have occurred. For instance, the probability of drawing 3 kings in a row from an ordinary deck of 52 playing cards is given by $(4/52)(3/51)(2/50) = 1/5{,}525$.[43] It is assumed here that we do not replace each card before the next one is drawn; had each card been immediately replaced, the probabilities of getting a king on the second and third draw would both have equaled $4/52$. In that case, the correct answer would have been $(4/52)(4/52)(4/52) = 1/2{,}197$ [44] Since the probability of getting a king on the second draw is now $4/52$ regardless of what happened on the first draw, we say that the second draw is *independent* of the first ≧ similarly, the third draw is now *independent* of the second as well as the first. In general, we use the following definition ≦
>
> *Event A is independent of event B if and only if*
>
> $$P(A \mid B) = P(A)$$

[42] $4/12 \times 3/11 = 12/132 = 1/11$.
[43] $4/52 \times 3/51 \times 2/50 = 24/132{,}600 = 1/5{,}525$.
[44] $4/52 \times 4/52 \times 4/52 = 64/140{,}608 \times 1/2{,}197$.

In words, event A is independent of event B when the occurrence of A is not affected by the occurrence of B. An immediate consequence of event A's independence of event B is that A is also independent of B', *namely, the occurrence of* A is not affected either by the *nonoccurrence* of B. Another important consequence (which follows directly from the rule on page 114) is that *if A is independent of B, then B is also independent of A*. Thus, we say that *A and B are independent*, whenever A is independent of B (or B is independent of A.) Otherwise, we say that A and B *are dependent.*

In the special case where A and B are independent, the formula for $P(A \cap B)$ assumes the form given in the following theorem, call the SPECIAL RULE OF MULTIPLICATION:

If A and B are independent events, then

$$P(A \cap B) = P(A)\,P(B)$$ [45]

Thus, the probability of getting a 6 in each of two successive rolls of a die is $(1/6)(1/6) = 1/36$; also, if the probability that a person examined for induction into the army has bad eyes is 0.08 and the probability that he has flat feet is 0.05, then the probability that he has bad eyes as well as flat feet is $(0.08)(0.05) = 0.004$.[46]

The above rule can easily be extended to apply to more than two independent events. Following the suggestion on page 115, we have only to multiply the individual probabilities of the independent events. For instance, the probability of getting 4 heads in a row with a balanced coin is $(1/2)(1/2)(1/2)(1/2) = 1/16$.[47]

In actual practice, we are apt to meet more *dependent* events than independent ones. For instance, if A and B represent, respectively, a husband and his wife's having completed 4 years of college, these events are dependent; A

[45] Since the examples in the text are quite simple and clear, it is not necessary to understand the formula. For those who do not understand the formula, and wish to do so, see Freund, *supra*, at 83-115. All the formula is saying is that where A and B are independent events, to determine the probability of both A *and* B happening, which is expressed mathematically as $P(A \cap B)$ (read probability of "A cap B" or simply "A and B"), as distinguished from the probability of A *or* B happening, which is expressed $P(A \cup B)$ (read probability of "A cup B" or simply "A or B"), you multiply the probability of A, *i.e.*, P(A), by the probability of B, *i.e.*, P(B).

[46] $8/100 \times 5/100 = 40/10{,}000 = 4/1{,}000 = 0.004$.

[47] $1/2 \times 1/2 \times 1/2 \times 1/2 = 1/16$.

and *B* would also be dependent if they represented a person's being a school teacher and his having an annual income of over $6,000, or if they represented the success of a Broadway play and the happiness of its backers.

In the present case, if we were to use more realistic assumptions as to how often the five key events referred to above would have occurred, by chance, in this Transaction 4 (*i.e.*, 1 in 100 for each event), the odds that all five events would occur, by chance, in a single transaction would be 1 in 10 billion ($1/100 \times 1/100 \times 1/100 \times 1/100 \times 1/100 = 1/10{,}000{,}000{,}000$). If we add in the commission overcharge event at 1 in 100, the odds of a chance occurrence would be 1 in 1 trillion.[48]

Irrespective of what assumptions are made as to how often each of these events could reasonably have occurred, by chance, it is quite clear that the odds against all these circumstances occurring by chance in Transaction 4 are so remote as to be not worthy of consideration. The events occurred (*i.e.*, the documentary entries) because they reflect what happened. And they prove beyond a shadow of a reasonable doubt (i) that respondent's invoice weight to Graf in Transaction 4 was determined by adding exactly 3% to the Kansas City purchase weight of Lot No. 66, and (ii) that respondent fabricated the scale ticket and worksheet to cover up his fraud.

H. Respondent Would Have Lost $238.09 in Transaction 4 Without Padding the Weight. By Padding the Weight, He Made a Profit of $613.95, Which Is $500.57 More than the Profit a Legitimate Order Buyer Would Have Made, and Respondent Could Have Undercut a Legitimate Order Buyer by 78¢ Per Cwt.

The 24 circumstances referred to in this section prove conclusively that the 55 steers sold to Graf in Transaction 4 were the 55 steers respondent purchased in Kansas City the day before as Lot No. 66, to which he added 1,360 pounds, exactly 3% of his purchase weight.

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[48] I have *sua sponte* relied on the laws of statistical probability in several prior cases. For example, in *In re Farrow*, 42 Agric. Dec. ___ (slip op. at 14–16) (Sept. 21, 1983), *aff'd in part and rev'd in part*, No. 83-2548 (8th Cir. Apr. 24, 1985) (merits affirmed; suspension reversed), I relied, *inter alia*, on the same law of statistical probability quoted in this subsection to reverse a finding of fact by an ALJ. The ALJ had held that there was no agreement between two dealers not to compete against each other. I relied on the law of statistical probability quoted above to show that their bidding would have occurred, by chance, from 1 time in 2,048 to 1 time in 536,870,912.

Respondent's weight-padding profit in this transaction was $852.04, *i.e.*, 1,360 pounds at $62.65 per cwt (JO Ref. 12, p. 23) (13.60 ×$62.65 = $852.04). However, this is one of the transactions where respondent reduced the price per cwt that he would have had to charge without the weight padding. So his actual "overcharge" to Graf was less than $852.04.

Respondent made a net profit of $613.95 on the 55 steers in Transaction 4.[49] Since respondent's profit due to padding the weight 1,360 pounds was $852.04, respondent's net loss would have been $238.09 without padding the weight ($852.04 −$613.95 = $238.09).

Respondent was entitled to a commission of 25¢ per cwt on the 45,350 pounds in Lot No. 66 (JO Ref. 6, p. 22), or $113.38 ($.25 ×453.50 = $113.38). Accordingly, respondent overcharged Graf $500.57 ($613.95 −$113.38 = $500.57). (Respondent's overcharge is also the amount by which his profit exceeded the profit that would have been made by a legitimate order buyer at 25¢ per cwt commission.)

Respondent's invoice price to Graf was 53¢ per cwt less than respondent's cost. That is, respondent paid $62.20 per cwt for Lot No. 66,[50] and he paid $.98 per cwt for transportation (*i.e.*, $1.30 (JO Ref. 83, p. 68) reduced by 25% (JO Ref. 85, p. 68)), for a total cost (including transportation) of $63.18 per cwt ($62.20 + $.98 = $63.18). He charged Graf only $62.65 per cwt (JO Ref. 12, p. 23), or 53¢ per cwt less than cost ($63.18 −$62.65 = $.53). Accordingly, no part of the sanction in this case is based on the commission overcharge in Transaction 4 since, without the weight padding, respondent undercharged Graf.

Any legitimate order buyer would have had to charge Graf $63.18 (the cost shown in the preceding paragraph), plus, *e.g.*, 25¢ commission or profit, or $63.43. That would have been 78¢ per cwt more than respondent's invoice price to Graf ($63.43 −$62.65 = $.78). Hence, by padding the weight, respondent could have undercut a legitimate order buyer by 78¢ per cwt in this transaction, and

[49] Respondent's expenses: $28,207.71, purchase price (JO Ref. 8, p. 22); $442.16, transportation (*i.e.*, $589.55 (JO Ref. 84, p. 68) reduced by 25% (JO Ref. 85, p. 68)); $43.90, insurance (JO Ref. 14, p. 23); Total expenses, $28,693.77; Respondent received $29,307.72 (JO Ref. 15, p. 23); Net profit: $613.95 ($29,307.72 −$28,693.77 = $613.95). My computations differ from complainant's table showing respondent's net profit, set forth in complainant's court brief at 33, primarily because complainant did not reduce respondent's transportation cost by 25%. A difference of a few dollars appears in some transactions because of "rounding" differences resulting from the use of two different methods of analysis.

[50] $28,207.71 ÷453.50 = $62.20 (JO Ref. 6, 8, p. 22).

still made $500.57 more profit than the legitimate order buyer would have made.

I. Here, as in Watergate, Respondent's Cover-Up Was More Flagrant than His Original Violation.

As shown in § XIX, respondent's fabrication of scale tickets and worksheets strikes at the heart of the enforcement program under the Packers and Stockyards Act. All dealers are required by law to keep accurate records so that complainant's investigators can determine whether a registrant is engaging in unfair or deceptive practices. Where, as here, a dealer fabricates records to give a facade of legitimacy to fraudulent transactions, detection of the fraud is made far more difficult. This is the most flagrant cover-up I have seen in my 35 years with the Department. The cover-up alone warrants more than the 8-month suspension order issued in this case (see § XIX).

J. Graf's Satisfaction with Respondent's Livestock Transactions Is Based on Respondent's Deception, and Is Irrelevant Here.

Respondent's customers, including Graf, were satisfied with respondent's livestock transactions. Graf's affidavit states (CX 19, p. 6):

> I have been pleased with the cattle for the most part which Saylor buys for me. When I am not satisfied I will sort off those which do not work for me and send them back.

However, Graf's satisfaction was based on the erroneous view that the "bill which I received from Saylor would show the number of head, Saylor's purchase weight and his purchase price and amount which included the cost of freight and Saylor's 25¢ per hundred commission" (CX 19, p. 5).

Whether Graf would have been happy if he had known that respondent's weight-padding profit in Transaction 4 was $852.04, and that his actual profit was $500.57 more than the "25¢ per hundred commission" which Graf thought that respondent had made (see § I(H), *supra*), we do not know. But even if Graf had remained satisfied knowing the actual facts, that would not in any manner have affected the sanction in this case (see § XIX, *infra*).

II. In Transaction 14, Respondent's Documentary Evidence Proves that on December 1, 1978, He Bought Only 121 Heifers from Woodson Livestock Auction, Weighing 54,030 Pounds, and 124 Steers (Totalling 245 Head). He Sold 121 Heifers to Lee L. Lowder, Allen, Kansas, the Next Day Allegedly Weighing 55,110 Pounds, an Increase of Exactly 2%. Respondent's Claim that He Sorted the 121 Heifers Out of a Total of 180 Heifers Purchased from Woodson Livestock Auction on December 1, 1978, Is Refuted by His Own Documentary Evidence. Eleven Circumstances Compel Me to Infer that the 2% Weight Increase Resulted from Respondent's Pencil Addition, and that His Scale Tickets Were Fabricated to Cover Up His Fraud.

A. On December 2, 1978, Respondent Sold Lowder 70 Steers (Which Are Not at Issue Here) and 121 Heifers Allegedly Weighing 55,110 Pounds.

Respondent's carbon copy of his invoice to Lee L. Lowder, Jr., Allen, Kansas, dated December 2, 1978, for 191 head of livestock in Transaction 14 is reproduced on the next page (RX 80).

Transaction 14 Invoice Copied From Respondent's Records (RX 80)

GEORGE [illegible] SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363
PHONE (217) 285-6186
(217) 285-4011

89 → DATE [illegible] 2 19 78

SOLD TO [illegible]

NO.	KIND	WEIGHT	PRICE	AMOUNT	
90 →	[illegible] (Fur 454)	31800	62.26	21547	15
	91 → (W) 93	94	95		
92 →	[illegible] (F. 455)	55110	60.07	33164	58
96 →	[illegible]	86910		54652	26
			[illegible]	169	30
	[illegible]			54261	56
97 →	02247 02250				
	02248 02251				
	02249				
	98 → Truck [illegible]				

+2966

53,103.23

Signed [illegible]

WE APPRECIATE YOUR PATRONAGE

Respondent's Exhibit #80

Respondent's carbon copy of the Transaction 14 invoice to Lowder, reproduced above, is identical to the original copy sent to Lowder, except that the scale ticket numbers (JO Ref. 97, p. 107) and the "(W)" (JO Ref. 91, p. 107) do not appear on the original sent to Lowder (CX 14, p. 3). (In addition, Mr. Lowder's original copy shows that he made a few calculations of his own on the invoice and then scratched them out (CX 14, p. 3).

The invoice to Lowder dated December 2, 1978 (JO Ref. 89, p. 107), is for a total of 191 head (JO Ref. 96, p. 107), consisting of 70 steers (JO Ref. 90, p. 107), which are not at issue here, and 121 heifers (JO Ref. 92, p. 107), allegedly weighing 55,110 pounds (JO Ref. 93, p. 107). Mrs. Manson testified that the "(W)" on her copy of the invoice (JO Ref. 91, p. 107) means that the livestock was purchased at Woodson Livestock Auction (Tr. 237–38).

B. Respondent Claims that on December 1, 1978, He Bought 156 Steers and 180 Heifers (Totalling 336 Head) at Woodson Livestock Auction and Sorted 121 Heifers Out of the 180 Head Purchased, that Weighed 55,110 Pounds (Respondent's Invoice Weight to Lowder).

Transaction 14 is the only transaction involved here in which respondent did not introduce a worksheet. A worksheet was not necessary here because respondent claims that he sorted 121 heifers out of a total of 180 heifers purchased at Woodson Livestock Auction the day before, and respondent does not claim to have added any prorated shrink. He claims that the printed scale ticket weights, which total the invoice weight of 55,110 pounds for the heifers (and the invoice weight of the steers), represent the actual weight at Pittsfield of the 121 heifers sorted out of the 180 heifers allegedly purchased the day before at Woodson.

Respondent's cover sheet to his exhibits for Transaction 14 takes the place of a worksheet. The cover sheet is reproduced on the next page.

#14 ← 99

100 → WOODSON

101 → December 1, 1978

102 → at Pittsfield

103 → 156 steers

104 → Sort out 70 steers weight 31800

105 → 180 heifers

106 → Sort out 121 heifers weight 55110 ← 107

70 steers and 121 heifers to Lowder

Total 191 head weight 86910

exhibit 74A through 74AAAA Purchase Invoices

exhibit 75 scale ticket
exhibit 76 scale ticket
exhibit 77 scale ticket
exhibit 78 scale ticket
exhibit 79 scale ticket

exhibit 80 billing

Witnesses: George Saylor
Dorothy Manson
Lee Lowder

RE #74A - #80
LSW 12/2/81

Respondent's cover sheet for Transaction 14 shows that the animals involved in Transaction 14 (JO Ref. 99, p. 110) were bought at Woodson Livestock Auction (JO Ref. 100, p. 110) on December 1, 1978 (JO Ref. 101, p. 110), and that they were sorted at Pittsfield (JO Ref. 102, p. 110). Specifically, the cover sheet shows that respondent sorted 70 steers (JO Ref. 104, p. 110) out of a total of 156 steers purchased from Woodson (JO Ref. 103, p. 110), and that he sorted 121 heifers (JO Ref. 106, p. 110) out of a total of 180 heifers purchased from Woodson (JO Ref. 105, p. 110). The 156 steers and 180 heifers allegedly purchased total 336 head (156 + 180 = 336).

The testimony of respondent and his bookkeeper, Mrs. Manson, coincides exactly with the data on the cover sheet, just discussed. It is important to read carefully the testimony of respondent and Mrs. Manson since respondent's new attorney apparently has concluded that their testimony and cover sheet are destroyed by respondent's own documentary evidence, and he apparently plans some new defense, not yet articulated. Respondent testified (Tr. 337-38):

> Q. Now, Mr. Saylor, referring to Exhibit Nos. 74-A through 80 which shows 70 steers and 121 heifers sold to Mr. Lauder, would you verify these statements as I give them to you? There are 156 steers which were purchased at Woodson and out of those, you sorted out 70 steers that weighed 31,800.
>
> A. Excuse me here, you are away ahead of me here. I have to catch up with you here.
>
> Q. Those exhibits, Exhibits Nos. 74-A through 74-AAAA, are all individual sales are all individual sales taken from the works.
>
> A. Apparently these cattle were just sorted and weighed with no shrink or anything.
>
> Q. That is what I was going to ask on the thing. In other words, you have 156 steers and you stored [sorted] 70 of them out that weighed 31,080 at your scales?
>
> A. Yes.
>
> Q. You bought 180 heifers and you sorted 121 out that weighed 55,110?
>
> A. Apparently that is what has happened?

Q. There was no shrink and nothing taken into consideration?

A. I don't see no breakdown or anything on it.

Q. Those were bought at Woodson? These steers and heifers were bought at Woodson which is a very short distance from Pittsfield?

A. Yes, sir.

Q. You made a private deal with Mr. Lauder on price and so forth on it?

A. Apparently, yes, sir.

Judge WEBER: In one of your questions, you referred to 31,080 and I think you meant thirty-one thousand, 800?

Mr. SCHIMMEL: Right, that is correct. If I stated 31,080, I meant 31,800.

Similarly, respondent's bookkeeper, Mrs. Manson, testified (T 173–74, 284–85):

Q. Mrs. Manson, I am handing you Respondent's Exhibits Nos. 74-A through 74-AAAA, and Nos. 75 through 80, inclusive. Would you examine those and tell us what Exhibit Nos. 74-A through 74-AAAA are?

(Respondent's Exhibits Nos. 74-A through 74-AAAA and Exhibits Nos. 75 through 80, inclusive, were marked for identification.)

Mr. SCHIMMEL: May I help you on that and state that they are intended to be individual sales tickets for a hundred and fifty-six steers and a hundred and eighty heifers from Woodson Livestock Auction?

By Mr. SCHIMMEL:

Q. Is that correct?

A. That is correct.

* * * * * * *

By Mr. HEINZ:

Q. Mrs. Manson, Respondent's Exhibits 74-A through 74-AAA[A] appear to be weight tickets from Woodson Livestock Auction.

A. Yes.

Q. Now, are those tickets indicative of the—where all of the cattle came from that were sold to Mr. Louder as indicated by Respondent's Exhibit 80 [Transaction 14 invoice to Lowder]?

A. They were cattle that was purchased on the 1st, and that they were weighed, these cattle were weighed out of those.

Q. But we have no way of knowing which ones, do we?

A. Well, they would have been sorted out of them.

Q. But, precisely which—we have 191 head of cattle that were sold to Mr. Louder, 70 steers and 121 heifers, and we have page after page of scale tickets. Now, how do we tell which of the cattle on this Woodson scale tickets went to Mr. Louder?

A. On the scale tickets, I would have no way of telling you. They were just sorted out of those cattle.

Q. We don't have any work sheet on this transaction, do we?

A. No. Just scale tickets.

Q. Are you saying the 121 head, the heifers came from Woodson also?

A. I am saying that they were sorted out of the Woodson cattle.

Most of respondent's briefs are consistent with the foregoing cover sheet and testimony. For example, respondent's original brief filed by his trial attorney on March 18, 1982, states, at 7:

> On December 1, 1978 Respondent purchased 156 steers and 180 heifers [which total 336 head] from Woodson Livestock. He sorted out 191 head of the above scale weights. They weighed 86910 which was the amount Mr. Lowder was billed for.
>
> This is supported by Respondent's exhibits 74A through 80 inclusive and the witnesses were George Saylor (*TR 337-338*), Dorothy Manson (*TR 174,175*) and Lee Lowder (*TR 58-61*).

Respondent's new attorney filed proposed findings on remand April 2, 1984, which are consistent with the cover sheet and testimony, but are silent as to the exact number purchased from Woodson. He states (Brief at 19–20):

> On December 1, 1978, Saylor purchased cattle at Woodson, Illinois, which were transported to Pittsfield via M & I Truck Lines (Cx. Ex. 14, p. 11). At Pittsfield, Saylor weighed out 191 head on his scale and recorded the weights on five serially numbered scale tickets (Rx. Ex. 75-79, T. 337, App. 32). The serial numbers from the five scale tickets were written on the invoice prepared on December 2, 1978, for the customer, along with the weight (Cx. Ex. 14).[51] The cattle were shipped via M & I Truck Lines to Allen, Kansas (Cx. Ex. 14). Customer Lowder paid with a check dated December 3, 1978 (Cx. Ex. 14, p. 3).

However, in respondent's Reply To Complainant's Opening Brief On Remand at 13, filed April 25, 1984, respondent's new attorney without expressly acknowledging a change of position, in effect repudiates the cover sheet and testimony of respondent and his bookkeeper, and adopts complainant's position (which is consistent with the actual facts) that respondent only bought 245 head from Woodson on December 1, 1978. He states (Brief at 13):

> At page 18 and 19 complainant states regarding Transaction 14:
>
> > Complainant's review of all of respondent's records revealed no evidence that respondent purchased more than 121 heifers from Woodson during the week of December 2, 1978.
>
> Complainant attempts to make an issue out of what is a clear transaction. The evidence shows that respondent purchased 245 head at Woodson on December 4, 1978. Subsequently, respondent sold 191 head. Respondent sorted cattle out of the cattle purchased at Woodson and Saylor weighed these animals on serially numbered scale tickets. A look at Cx. Ex. 14 page 2 [which contains five scale tickets for the 70 steers and 121 heifers in Transaction 14] shows that those scale tickets never were in question.

[51] Although it is not material in this transaction, the serial numbers from the five scale tickets were written only on respondent's carbon copy of the Transaction 14 invoice (CX 14, p. 1; RX 80), and not on the original sent to Mr. Lowder (CX 14, p. 3). This is another example of respondent's attorney's deliberate deception.

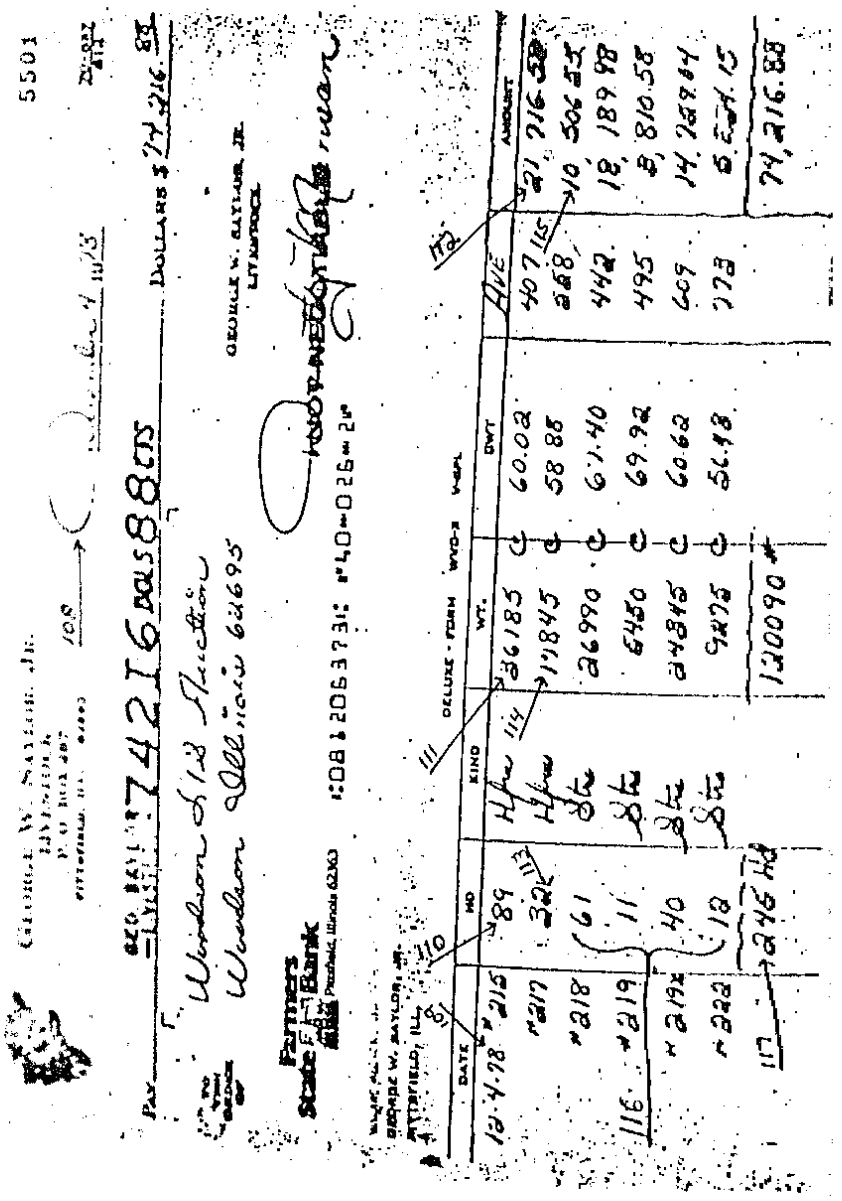
Since respondent's new attorney has been so deliberately deceptive in his briefs, I cannot be sure whether this is an inadvertent mistake (*i.e.*, he meant to say that respondent purchased 336 head at Woodson) or a deliberate attempt to change the entire story as to Transaction 14 told by respondent's cover sheet, and by respondent and Mrs. Manson. The purchase date of December 4, 1978, is an obvious mistake since the invoice to Lowder is dated December 2, 1978 (JO Ref. 89, p. 107). However, the December 4 date appears only on Mrs. Manson's check to Woodson (JO Ref. 108, p. 117), and her corresponding check stub (JO Ref. 109, p. 117), which has been consistently used *by complainant* to prove that respondent bought only 245 head from Woodson Livestock Auction on December 1, 1978 (JO Ref. 117, p. 117).

As shown below, if this is not an innocent mistake, but is, rather, a deliberate attempt to change respondent's entire story as to Transaction 14, it will be to no avail since the documentary evidence proves conclusively that the 245 head purchased on December 1, 1978, from Woodson (JO Ref. 117, p. 117) consist of only 121 heifers, specifically 89 heifers (JO Ref. 110, p. 117) and 32 heifers (JO Ref. 113, p. 117), which total 121 heifers (89 + 32 = 121). So no matter how much sorting went on at Pittsfield, since there were only 121 heifers in the 245 head purchased, the 121 heifers sorted out of the 245 head were the identical 121 heifers originally purchased.

C. Respondent's Documentary Evidence Proves that on December 1, 1978, Respondent Bought Only 121 Heifers from Woodson Livestock Auction, Weighing 54,030 Pounds, and 124 Steers, for a Total of 245 Head.

Respondent's check and check stub with respect to the steers and heifers purchased by respondent on December 1, 1978, from Woodson Livestock Auction, Woodson, Illinois, photocopied from respondent's records, is reproduced on the next page (CX 14, p. 19).

Respondent's Check and Check Stub (CX 14, p. 19)



5501

GEORGE W. BAYLOR, JR.
LIVESTOCK
P. O. BOX 487
PITTSFIELD, ILL. 62363

108

December 4, 1973

PAY TO THE ORDER OF 620 BAL 74216 88 CTS DOLLARS $ 74,216.88

Windham Stockyards
Windham Illinois 62693

GEORGE W. BAYLOR, JR.
LIVESTOCK

NOT NEGOTIABLE

Farmers State Bank
Pittsfield, Illinois 62363

⑆08 2 063731⑆ ⑈40-026⑈ 2⑈

WIRE ADDR. GEORGE
GEORGE W. BAYLOR, JR.
PITTSFIELD, ILL.

DELUXE FORM WVD-2 VIGIL

DATE	NO	KIND	WT.	DWT	AMOUNT
12-4-73	#215	89 Hfwr	36185	60.02	21,216.58
	#217	322 Hfwr	11845	58.85	506.45
	#218	61 Stk	26990	67.40	18,189.98
	#219	11 Stk	6450	69.92	8,810.58
	#2192	40 Stk	24845	60.62	14,928.94
	#222	18 Stk	9275	56.98	5,284.15
		946 Hd	120090 #		74,216.88

110 111 112 113 114 115 116 117

Mrs. Manson's check to Woodson Livestock Auction for respondent's December 1 livestock purchases is dated December 4, 1978 (JO Ref. 108, p. 117), the same date which appears on her check stub (JO Ref. 109, p. 117). (However, the Woodson sales invoices show the correct date of December 1, 1978 (RX 74A–74AAAA)). The check stub shows, *inter alia*, that it is in payment for 89 heifers (JO Ref. 110, p. 117) and 32 heifers (JO Ref. 113, p. 117), for a total of 121 heifers. The 89 heifers weighed 36,185 pounds (JO Ref. 111, p. 117) and the 32 heifers weighed 17,845 pounds (JO Ref. 114, p. 117), for a total of 54,030 pounds (36,185 + 17,845 = 54,030).

The check stub also shows that respondent purchased four lots of steers, consisting of 61 head, 11 head, 40 head and 12 head (JO Ref. 116, p. 117), for a total of 124 steers (61 + 11 + 40 + 12 = 124). The total number of steers and heifers purchased was 245 (JO Ref. 117, p. 117), consisting of 121 heifers and 124 steers (121 + 124 = 245).

Hence, the documentary evidence generated by Mrs. Manson (and photocopied from respondent's records) contradicts (i) the story told on respondent's cover sheet for his Transaction 14 exhibits, (ii) the testimony of respondent, and (iii) the testimony of Mrs. Manson, that respondent purchased 156 steers and 180 heifers on December 1, 1978, from Woodson (which total 336 head (156 + 180 = 336)), and sorted 121 heifers out of the 180 heifers purchased.

Moreover, an analysis of all of the sales tickets from Woodson Livestock Auction for respondent's December 1, 1978, purchase (again obtained from respondent's records) proves conclusively that Mrs. Manson's check stub figures are accurate, *i.e.*, respondent purchased exactly 121 heifers on December 1, 1978, from Woodson, and exactly 124 steers, for a total of exactly 245 head. All of the Woodson sales tickets were introduced in evidence by respondent (RX 74A–74AAAA). Two of the sales tickets, typical of the others, are reproduced on the next page.

Woodson Heifer Sales Ticket (RX 74D)

Woodson Livestock Auction
Woodson, Illinois

RUSSELL PENNELL
Owner
Phone 673-9221

SALES EVERY FRIDAY

Date 12-1-78

Consignor Burley Buffer

Address

Description Roan H. 119

191340

Weight 380

330

Price 57.25 217.55

Com.

Vac.

Tag 747

Pen

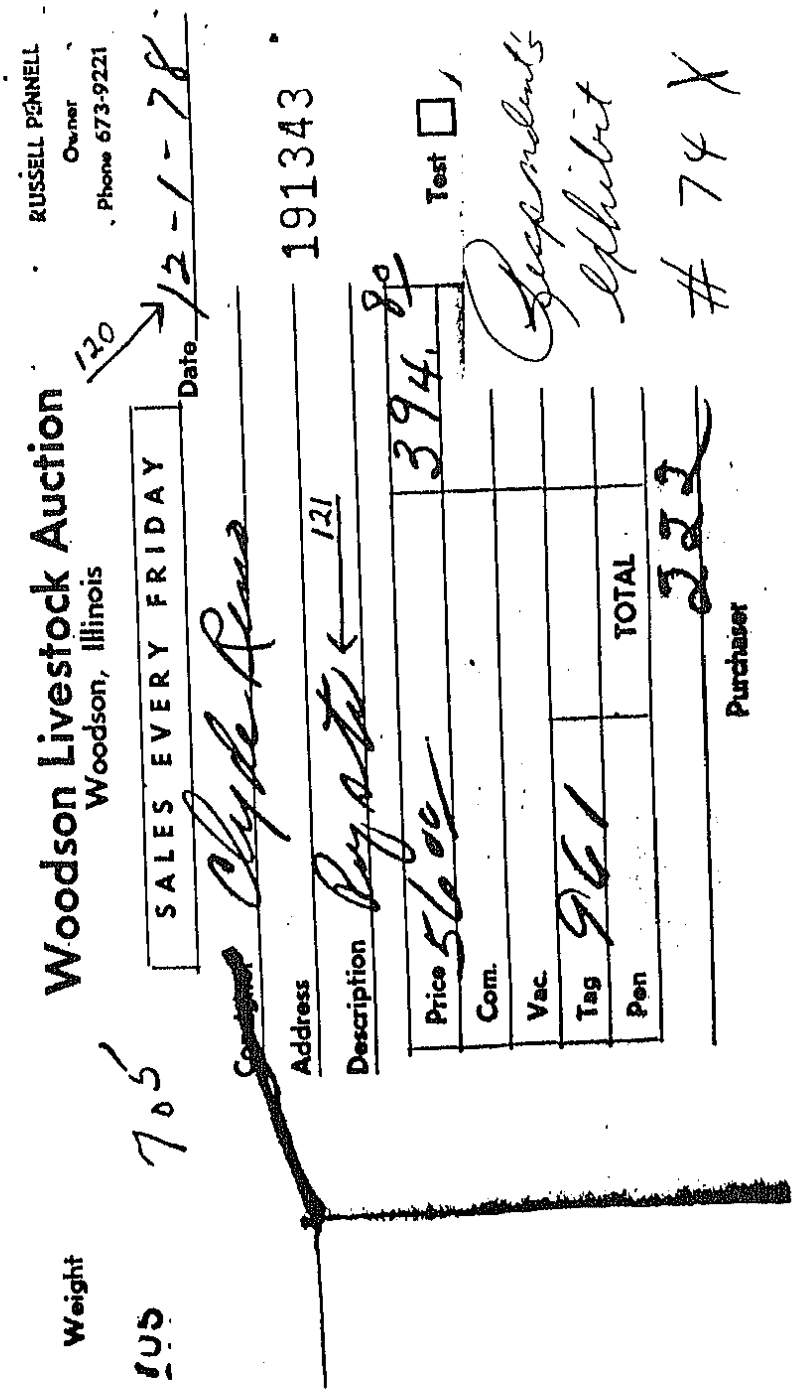
TOTAL 215

Test ☐

Slaughter ☐

Purchaser Respondent's Exhibit 6

Woodson Steer Sales Ticket (RX 74X)



Woodson Livestock Auction
Woodson, Illinois

RUSSELL PENNELL
Owner
Phone 673-9221

SALES EVERY FRIDAY

Date 12-1-78

Consigned Clyde Rees

Address

Description Reg steer

Price 56.00

Com.

Vac.

Tag 9GL

Pen

TOTAL 332

Purchaser

Test

Weight 705 105

120

121

191343

394

80

Respondent's Exhibit

74 X

Each of the sales tickets from Woodson in respondent's exhibits RX 74A–74AAAA is dated December 1, 1978 (*e.g.*, JO Ref. 118, 120, p. 120). It is easy to distinguish the heifer sales tickets from the steer sales tickets since all of the heifer sales tickets have "H" (JO Ref. 119, p. 120), and all of the steer sales tickets have "str" or "strs" (JO Ref. 121, p. 120).[52] The task is made easier since all of the steer sales tickets are in five bundles of sales tickets (with the RX numbers in alphabetical order), each bundle stapled together, and all of the heifer sales tickets are in four bundles (with the RX numbers in alphabetical order), each bundle stapled together. There are no steers mixed in with the heifer bundles, and vice versa (but 22 bulls are mixed in with the steers).

Adding machine tapes of *all* of the Woodson sales tickets introduced in evidence by respondent (RX 74A–74AAAA), prepared by my secretary, are reproduced on the following page.

les tickets included in the 124 head purchased as steers (according) show that 22 head were bulls (RX 74III, 74LLL, 74RRR, 74SSS,).

Respondent's Purchases From Woodson Livestock Auction, December 1, 1978 (RX 74A–74AAAA)

	Column 1 No. of Heifers	Column 2 No. of Steers and Bulls	Column 3 Weight of Heifers
Group 1 58 hd	1.00 + RX74A	1.00 + RX74X	425.00 + RX74A
	1.00 + " B	1.00 + " Y	495.00 + " B
	1.00 + " C	1.00 + " Z	505.00 + " C
	1.00 + " D	Group 3 12 hd 1.00 + " AA	380.00 + " D
	1.00 + " E	1.00 + " BB	570.00 + " E
	1.00 + " F	1.00 + " CC	495.00 + " F
	1.00 + " G	4.00 + " DD	370.00 + " G
	1.00 + " H	1.00 + " EE	440.00 + " H
	2.00 + " I	1.00 + " FF	645.00 + " I
	1.00 + " J	2.00 + " SS	430.00 + " J
	2.00 + " K	18.00 + " TT	640.00 + " K
	2.00 + " L	Group 5 32 hd 4.00 + " UU	690.00 + " L
	1.00 + " M	1.00 + " VV	405.00 + " M
	7.00 + " N	7.00 + " WW	3020.00 + " N
	4.00 + " O	1.00 + " BBB	1745.00 + " O
	3.00 + " P	Group 7 8 hd 7.00 + " CCC	1475.00 + " P
	2.00 + " Q	3.00 + " DDD	830.00 + " Q
	5.00 + " R	1.00 + " EEE	2155.00 + " R
	4.00 + " S	Group 8 11 hd 7.00 + " FFF	1380.00 + " S
	2.00 + " T	1.00 + " GGG	890.00 + " T
	1.00 + " U	1.00 + " HHH	405.00 + " U
	14.00 + " V	1.00 + " III	5395.00 + " V
Group 2 4 hd	4.00 + " W	1.00 + " JJJ	2245.00 + " W
	2.00 + " GG	1.00 + " KKK	1095.00 + " GG
	2.00 + " HH	1.00 + " LLL	1025.00 + " HH
	3.00 + " II	1.00 + " MMM	1470.00 + " II
	1.00 + " JJ	1.00 + " NNN	495.00 + " JJ
	1.00 + " KK	7.00 + " OOO	1030.00 + " KK
	1.00 + " LL	14.00 + " PPP	685.00 + " LL
Group 4 28 hd	4.00 + " MM	Group 9 61 hd 1.00 + " QQQ	2300.00 + " MM
	5.00 + " NN	1.00 + " RRR	2805.00 + " NN
	1.00 + " OO	1.00 + " SSS	545.00 + " OO
	1.00 + " PP	1.00 + " TTT	545.00 + " PP
	6.00 + " QQ	6.00 + " UUU	3055.00 + " QQ
	1.00 + " RR	1.00 + " VVV	550.00 + " RR
	1.00 + " XX	3.00 + " WWW	455.00 + " XX
Group 6 31 hd	25.00 + " YY	4.00 + " XXX	9905.00 + " YY
	3.00 + " ZZ	1.00 + " YYY	1150.00 + " ZZ
	2.00 + " AAA	1.00 + " ZZZ	890.00 + " AAA
	121.00 ◊	12.00 + " AAAA	54030.00 ◊
	121.00 *	124.00 ◊	54030.00 *
		124.00 *	

I proofread the adding machine tapes and entered the number of each of respondent's exhibits on the tapes. Column 1 shows the number of heifers included in each sales ticket, and the exhibit number of each heifer sales ticket. My group numbers refer to the bundles of sales tickets as they were stapled together by respondent, and the order in which the bundle appears in respondent's exhibits. Column 1 shows that respondent purchased exactly 121 heifers from Woodson on December 1, 1978.

Column 2 shows the same information for the steers and bulls purchased by respondent from Woodson on December 1, 1978. Column 2 shows that respondent purchased exactly 124 steers from Woodson on December 1, 1978. The 121 heifers from Column 1 and 124 steers and bulls from Column 2 total 245 head (121 + 124 = 245).

Column 3 shows the weight of the 121 heifers, 54,030 pounds, which is the exact weight shown on respondent's check stub for the 121 heifers (36,185 + 17,845 = 54,030; JO Ref. 111, 114, p. 117). This is also respondent's purchase weight in Transaction 14 as alleged in ¶ 11 of the complaint.

Hence respondent's check stub to Woodson and respondent's sales tickets received from Woodson prove conclusively that on December 1, 1978, respondent bought exactly 121 heifers from Woodson (not 180, as claimed by respondent's cover sheet, respondent and Mrs. Manson) and exactly 124 steers (and bulls) (not 156, as claimed by respondent's cover sheet, respondent and Mrs. Manson).

On cross-examination, however, Mrs. Manson testified that on occasions she would issue a second check to Woodson if she did not have all of the sales tickets from Woodson. She testified (Tr. 286–87):

> Mr. HEINZ: Complainant's Exhibit 14, Page 19, is a check.
>
> By Mr. HEINZ:
>
> Q. Do you have it?
>
> A. Yes.
>
> Q. Does this check represent all the cattle that were purchased from Woodson on that week's sale?
>
> A. I would have to go back through the tickets. I couldn't tell you for sure.
>
> Q. Would you write more than one check to Woodson——

A. Yes.

Q. (Continuing) —on one day?

A. On one day? Sometimes they don't get all the tickets to us, yes.

Q. Does Woodson have more than one sale a week?

A. The only one I know of is on Friday, that we would be involved in. I imagine they have other sales other days.

Q. When do you receive the bills for the purchases made on that Friday?

A. Sometimes on Friday, when the trucks come back, Mr. Saylor brings them back.

Q. If you don't receive them on Friday, then, when would you receive them?

A. If I don't get them on Friday, I call and get the information I need by phone, and the trucker picks them up and brings them in, or they are mailed to us.

Q. As a matter of common practice, do you issue more than one check to Woodson—

A. I have.

Q. (Continuing) —per week?

A. I have, yes.

Q. But, as a matter of common practice, it is one check, on occasion you would write more than one?

A. On occasion I have wrote more than one, yes.

In rebuttal, Mr. Gentry testified that he reviewed all of respondent's records provided to him for the weeks preceding December 1, 1978, and the weeks following this week, and determined that there was no evidence that respondent purchased more than 121 heifers from Woodson during the week. Specifically, he testified (Tr. 367):

Q. Mr. Gentry, I direct your attention to Complainant's Exhibit No. 14, Page 19. Mr. Gentry, this check purports to show a purchase of livestock from Woodson Livestock Auction. Do you know how many sales per week Woodson Livestock Auction ordinarily has?

A. Ordinarily, it has one a week.

Q. Did you review all of the records provided you by the respondent to determine what livestock had been purchased by the respondent from Woodson as evidenced by this check?

A. I did.

Q. Did you review the records of the respondent for the weeks preceding this week to determine what livestock had been purchased by the respondent?

A. I did.

Q. Did you review the records, respondent's records for the weeks following this week to determine what livestock had been purchased by the respondent? I61A. Yes, I did.

Q. On the basis of your review of the respondent's records, was there any evidence in the records that the respondent purchased more than 121 heifers from Woodson Livestock during this week?

A. There was none.

Accordingly, there is no basis in the record for any contentior that respondent purchased additional heifers that are not reflectec in his December 4, 1978, check and check stub relating to his De cember 1, 1978, purchase from Woodson. Moreover, since respond ent introduced all of the sales tickets from Woodson into evidence if additional sales tickets had been sent by Woodson to respondent the following week, respondent would have introduced them intc evidence. And if Mrs. Manson had written another check to Wood son for sales tickets received later, respondent would have introduced a copy of that check and check stub. (Furthermore, as shown in § II(D), immediately following, it is easy to determine why respondent erroneously claimed that he bought 180 heifers and 15(steers.)

Hence the documentary evidence from respondent's records completely destroys the story told on respondent's cover sheet for his transaction 14 exhibits, and by respondent and Mrs. Manson at he hearing, that respondent purchased 156 steers and 180 heifers (totalling 336 head) from Woodson on December 1, 1978. Respondent's check stub and the Woodson sales tickets are "smoking guns" that conclusively prove that his story as to how the weight gain occurred was fabricated.

D. When Respondent Fabricated the Story that He Sorted 121 Heifers Out of 180 Heifers Purchased from Woodson on December 1, 1978, He Was Misled by His Adding Machine Tapes into Believing that He Had Purchased 180 Heifers and 156 Steers, for a Total of 336 Head.

Here, as in Transaction 4, discussed in § I(C)(1)(a) and (2)(a), *supra*, the question may arise as to how respondent could be so incredibly careless (or stupid) as to concoct a story that he sorted 121 heifers out of a total of 180 heifers as his explanation for the weight increase of exactly 2% in Transaction 14. Respondent's downfall was his tapes—*i.e.*, his adding machine tapes. By analyzing respondent's adding machine tapes stapled to each group of the Woodson sales tickets, we can see how, months after the fact, when respondent was concocting his cover-up, he mistakenly believed that he had bought 180 heifers, rather than 121, and that he had bought 156 steers, rather than 124. (This analysis also supports my inference that respondent's cover-up was fabricated months after the fact, when he was relying on records, rather than his memory.)

Respondent's adding machine tapes with respect to his December 1, 1978, purchases of heifers from Woodson Livestock Auction are reproduced on the next page.

Respondent's December 1, 1978, Woodson Heifer Tapes

Group 1 Bottom Tape

0·00 *I
247·56 +
283·39 +
252·50 +
217·55 +
326·33 +
279·68 +
221·08 +
273·90 +
356·36 +
248·33 +
376·00 +
405·38 +
258·19 +
1940·35 +
1016·46 +
888·69 +
520·83 +
1341·49 +
800·40 +
538·45 +
241·99 +
3277·46 +
129 → 14312·37 *I

128 → 40

36185#

2 ← 135

0·00 *I
0·00 *I

Group 1 Top Tape

0·C0 *I
133 → 14312·37 +
134 → 7404·21 +
125 → 21716·58 *I

126 →

Group 2 Tape

8·*
130 → 9,238·12+
131 → 1,268·43+
132 → 10,506·55*

134 → 32 hd.

136 → 17,845 lbs.

Group 4 Tape

132 → 28 hd.
15,600 lbs.

0·
607·73
602·19
863·63
289·58
594·83
354·49
1,431·75
1,591·84
329·73
376·05
1,863·55
332·75
127 → 9,238·12

Group 6 Tape

0·00
268·45
5943·00
669·88
522·88
133 → 7404·21

137 → 31 head
12,400 dressed

These are copies of the actual adding machine tapes that were stapled to respondent's bundles of Woodson (heifer) sales tickets. All of the data on the tapes are on the original adding machine tapes, introduced into evidence by respondent, except that Judicial Officer references and group headings, corresponding to the groups referred to on my adding machine tapes (§ 11(C), immediately above), are added.

1. Overview of Respondent's Adding Machine Tapes, Which Misled Him into Believing that He Had Purchased 31 Heifers and 28 Heifers (for a Total of 59 Heifers) More than He Actually Purchased (180 −59 = 121).

For a quick overview, before beginning a tedious analysis of the tapes, when respondent looked at these tapes relating to his heifer purchases months after the fact, he erroneously thought he had bought 89 head (JO Ref. 128, p. 128), 32 head (JO Ref. 134, p. 128), 28 head (JO Ref. 122, p. 128), and 31 head (JO Ref. 137, p. 128), which total 180 head (89 + 32 + 28 + 31 = 180), the exact number of heifers claimed by respondent on the cover sheet for his Transaction 14 exhibits (JO Ref. 105, p. 110), and by respondent and Mrs. Manson in their testimony. Unfortunately for respondent, however, the 31 head and 28 head, totalling 59 head (31 + 28 = 59), are included within the other figures. That accounts for respondent's 59-head error (180 −59 = 121).

2. Respondent's 31-Head Heifer Error.

The first bundle of Woodson sales tickets (RX 74A–74V) had two adding machine tapes stapled to it, which I have labeled Group 1 Bottom tape and Group 1 Top tape, *i.e.*, the Top tape was stapled on top of the Bottom tape. The Group 1 Bottom tape shows the figure of 89 (JO Ref. 128, p. 128) and the weight of 36,185 pounds (JO Ref. 135, p. 128). (This is the weight of the 89 heifers purchased by respondent as one lot on December 1, 1978 (JO Ref. 110, 111, p. 117)). Respondent's figures on the Group 1 Bottom tape add the prices respondent paid for the 58 heifers included in the Group 1 bundle of sales tickets (RX 74A–74V). The total price respondent paid for these 58 heifers, $14,312.37 (JO Ref. 129, p. 128), was carried over to the Group 1 Top tape, as the first figure (JO Ref. 123, p. 128).

The second figure on the Group 1 Top tape, $7,404.21 (JO Ref. 124, p. 128), was carried over from the Group 6 tape (JO Ref. 133, p. 128), consisting of 31 head (JO Ref. 137, p. 128) (RX 74XX–74AAA).

When that cost figure for 31 head, $7,404.21, is added to the cost of the 58 head listed on the Group 1 Bottom tape, $14,312.37, which is also the first figure on the Group 1 Top tape, the total for the 89 head (31 + 58 = 89), as shown on the Group 1 Top tape, is $21,716.58 (JO Ref. 125, p. 128). This is the identical price shown for the 89 heifers on respondent's check stub (JO Ref. 112, p. 117).

The 31 head on the Group 6 tape is where respondent made his first mistake when he was concocting his defense months after the fact. He thought that the 31 head shown on the Group 6 tape, together with their weight, were separate from the 89 head shown on the Group 1 Bottom tape, with their weight. But, actually, the Group 1 Top tape shows that the 31 head were included in the 89; *i.e.*, the price paid for the 89 heifers, $21,716.58, was obtained by adding the price of the 58 heifers shown on the Group 1 Bottom tape, $14,312.37 (JO Ref. 129, p. 128) (which figure was carried over to the top of the Group 1 Top tape), and the price of the 31 heifers shown on the Group 6 tape (JO Ref. 124, 133, p. 128), resulting in the total price paid for the 58 head and the 31 head, or 89 head, of $21,716.58 (JO Ref. 112, p. 117; JO Ref. 125, p. 128).

The figure of 58 on the Group 1 Top tape (JO Ref. 126, p. 128) is written very dimly in pencil, and actually refers to the number of animals on the Group 1 Bottom tape. The figure of 89 on the Group 1 Bottom tape (JO Ref. 128, p. 128) actually refers to the total number of animals shown on the Group 1 Top tape (which includes the 31 head from the Group 6 tape). Hence the entries would have been more accurate if Mrs. Manson had put the figure of 58 on the Group 1 Bottom tape and the figure of 89 on the Group 1 Top tape. However, since both tapes were stapled to the same group of sales tickets, and the figure of "58" had no weight figure accompanying it, this would not have confused respondent into thinking that the Group 1 Bottom and Top tapes refer to a total of 147 head (89 + 58 = 147).

But since the Group 1 Bottom tape had the number of animals (89) and their weight (36,185 pounds), and the Group 6 tape showed 31 head, and their weight (12,400 pounds), it is easy to see how, months after the fact, respondent thought that the 31 head on the Group 6 tape were in addition to the 89 head on the Group 1 Bottom tape.

3. Respondent's 28-Head Heifer Error.

A similar mistake resulted in respondent thinking that he had purchased an additional 28 heifers. The Group 4 tape, which adds the cost of the 28 heifers in RX 74GG-74RR, totalling $9,238.12 (JO Ref. 127, p. 128), shows 28 head (JO Ref. 122, p. 128), together with

their weight. This figure, $9,238.12, was carried over to the Group 2 tape (JO Ref. 130, p. 128). The Group 2 tape then adds the price of the single sales ticket in Group 2 (RX 74W), *i.e.*, $1,268.43 (JO Ref. 131, p. 128), consisting of four heifers (RX 74W), for a total price for the 32 heifers shown on the Group 2 tape of $10,506.55 (JO Ref. 132, p. 128), the exact price shown on respondent's check stub for 32 heifers (JO Ref. 115, p. 117).

The Group 2 tape shows that it is for 32 head (JO Ref. 134, p. 128), and shows the weight of the 32 head as 17,845 pounds (JO Ref. 136, p. 128), the exact weight of the 32 heifers shown on respondent's check stub (JO Ref. 114, p. 117). Here, again, when respondent looked at his adding machine tapes months after the fact, he thought that the Group 4 tape, showing 28 head and their weight, was in addition to the Group 2 tape, showing 32 head and their weight, when, in fact, the 28 head shown on the Group 4 tape were part of the 32 head shown on the Group 2 tape.

In summary, respondent's adding machine tapes led him to believe, months after the fact, that on December 1, 1978, he had purchased 89 heifers (JO Ref. 128, p. 128), 32 heifers (JO Ref. 134, p. 128), 28 heifers (JO Ref. 122, p. 128), and 31 heifers (JO Ref. 137, p. 128). That totals 180 head (89 + 32 + 28 + 31 = 180), the exact number of heifers shown on respondent's cover sheet for Transaction 14, and the exact number referred to by respondent and Mrs. Manson in their testimony.

If respondent had realized that he had only purchased 121 heifers from Woodson on December 1, 1978, he obviously would have fabricated his usual worksheet, showing the in-weight of the 121 heifers, the weight of the animals allegedly removed, and the weight of the animals allegedly added. But since respondent thought, months after the fact, that he had purchased 180 heifers from Woodson on December 1, 1978, and in order to add a little variety to his cover-up, he did not fabricate a worksheet for Transaction 14, but merely claimed that he sorted 121 head out of the 180 head he thought he had purchased.

4. Respondent's 32-Head Steer Error (156 −32 = 124).

Although no issue is involved here as to the weight of the 70 steers which were included in the Transaction 14 invoice to Lowder (JO Ref. 90, p. 107), it is worth showing, briefly, that the same type of adding-machine-tape error caused respondent to believe, months after the fact, that he had purchased 156 steers from Woodson on December 1, 1978, rather than 124 steers. Respondent's adding ma-

chine tapes for his steer purchases from Woodson on December 1, 1978, are reproduced on the next page.

Respondent's December 1, 1978, Woodson Steer Tapes

Group 3 Tape

0·00 *I

394·80 +
455·88 +
427·50 +
394·80 +
492·00 +
482·83 +
1775·64 +
391·50 +
420·00 +
5234·15 *I

12 hd. ← 142

9275 lbs.

Group 5 Tape

0·00 *I

774·21 +
6650·20 +
2491·46 +
422·10 +
1238·74 +
145 → 11576·79 *I

146 → 32 Head

19,185

Group 7 Tape

138 → 11,576·79+
139 → 336·60+
140 → 2,845·65+
14,759·04*

141 → 40 hd.

24,345 lbs.

Group 8 Tape

0·00 *I

1062·68 +
338·40 +
2409·58 +
3810·58 *I

11 hd. ← 144

5450 lbs.

Group 9 Tape

0·*

248·00+
253·65+
260·93+
327·50+
389·89+
345·31+
383·75+
242·38+
1,845·51+
4,837·14+
365·40+
226·00+
278·89+
260·70+
2,154·96+
287·90+
811·73+
1,133·28+
296·23+
191·75+
3,216·28+
10,189·98*

61 hd. ← 143

26,990 lbs.

Here, again, there are copies of the actual tapes that were sta pled to respondent's bundles of Woodson (steer) sales tickets. Re spondent thought that these tapes showed that on December 1 1978, he had purchased from Woodson 12 head (JO Ref. 142, p. 134 32 head (JO Ref. 146, p. 134), 40 head (JO Ref. 141, p. 134), 11 hea (JO Ref. 144, p. 134), and 61 head (JO Ref. 143, p. 134), for a total o 156 head (12 + 32 + 40 + 11 + 61 = 156), the exact number o steers claimed by respondent on the cover sheet for his Transactio 14 exhibits (JO Ref. 103, p. 110), and by respondent and Mrs Manson in their testimony.

Unfortunately for respondent, however, the price paid for the 3 head from the Group 5 tape, $11,576.79 (JO Ref. 145, p. 134), wa carried over to the top of the Group 7 tape (JO Ref. 138, p. 134 The other two figures on the Group 7 tape are for one steer $336.60 (RX 74BBB) (JO Ref. 139, p. 134), and seven steers $2,845.65 (RX 74CCC) (JO Ref. 140, p. 134). Hence the figure of 4 head on the Group 7 tape (JO Ref. 141, p. 134) includes the 32 hea from the Group 5 tape. Eliminating this duplication of 32 head re sults in the actual number of steers purchased by respondent fro Woodson on December 1, 1978 (156 −32 = 124).

Hence respondent's downfall in Transaction 14 was his tapes— his adding machine tapes! Respondent's adding machine tapes are "smoking guns," showing conclusively why respondent erroneously thought, months after the fact, when he was concocting his defens to his 2% pencil addition to his purchase weight, that he could claim to have sorted 121 heifers out of 180 he thought he pur chased.

E. Respondent's Invoice Weight to Lowder Is Exactly 2% More than His Purchase Weight.

As shown in § II(C), *supra*, respondent's purchase weight on De cember 1, 1978, of the 121 heifers was 54,030 pounds. As shown in § II(A), *supra*, respondent's invoice weight to Lowder on December 2, 1978, for the 121 heifers was 55,110 pounds (JO Ref. 93, p. 107). This is an increase of 1,080 pounds (55,110 −54,030 = 1,080), which is exactly 2% more than respondent's purchase weight the day before. That is, a person using a calculator to add exactly 2% to the purchase weight would read 1,080.6 on the calculator (.02 ×54,030 = 1,080.6), which rounds to 1,080 pounds, the exact amount of the increase.[53]

[53] See § I(A), *supra*, as to why respondent "rounded" his increases of exactly 2% and 3% to the nearest 5-pound multiple.

F. Eleven Circumstances Compel Me to Infer that the Weight Invoiced to Lowder for 121 Heifers in Transaction 14, Which is Exactly 2% More than Respondent's Purchase Weight of 121 Heifers from Woodson Livestock Auction the Day Before, Resulted from Respondent's Pencil Addition, and that His Scale Tickets Were Fabricated to Cover Up His Fraud.

In drawing the inference that the 2% weight increase in Transaction 14 resulted from respondent's pencil addition, and that his scale tickets were fabricated to cover up his fraud, I have relied primarily on the following seven circumstances:

1. Respondent's cover sheet to his exhibits shows that he sorted 121 heifers out of 180 heifers purchased from Woodson on December 1, 1978;

2. Respondent's testimony is to the same effect;

3. Mrs. Manson's testimony is to the same effect;

4. Respondent's check stub shows that he purchased only 121 heifers from Woodson on December 1, 1978;

5. Respondent's sales tickets from Woodson show that he purchased only 121 heifers from Woodson on December 1, 1978;

6. Respondent's adding machine tapes stapled to the Woodson sales tickets show why he thought he could claim, as a cover-up, that he sorted 121 heifers out of a total of 180 heifers which he thought he had purchased from Woodson on December 1, 1978; and

7. Here, as in the case of 6 of the other 13 alleged reweighing transactions, the increase in weight was exactly 2% or exactly 3% more than respondent's purchase weight for the identical number of animals purchased on the same day, or a day or two before. (In this transaction, the odds of that occurring by chance were 1 in 433, if there had been sorting of heifers (see § I(D)(4), *supra*, and § XII(A), *infra*).

In addition, I rely on the following four circumstances which are common to most of the alleged reweighing transactions:

1. Respondent admittedly bought some lots on order for particular customers, which gave him the opportunity to pad weights on the lots (see § XII(B), *infra*);

2. Respondent sorts livestock in some transactions, but not others, which gave him the opportunity to pad weight (claiming he sorted), without the customer becoming suspicious (see § XII(C), *infra*);

3. The cumulative effect of suspicious circumstances in the 14 transactions (see § XII(G), *infra*); and

4. The ALJ, who saw and heard the witnesses testify, di believe the testimony of respondent or Mrs. Manson, in par cause of their demeanor on the witness stand (see § XII(H), *i*

Since respondent's documentary evidence destroys the bas his cover sheet, his testimony, and Mrs. Manson's testimony respect to Transaction 14, the only theoretical argument avai for respondent's attorney is that the 121 heifers gained exactl in weight between their purchase on December 1, 1978, and sale the next day. If respondent's attorney has the temerity t vance such an absurd contention in a petition to reconsider, I reject it.

First, such an argument would be without any support in record. Second, it would be contrary to the position of respon his bookkeeper, and his cover sheet as to why the 121 he weighed 55,110 pounds. Third, it would be contrary to the evid in the other transactions (and my own knowledge from prior and Packers and Stockyards Administration experience) that livestock would have shrunk from their handling and transp tion (even though the transportation was not over a great dista Finally, as stated above, the statistical odds that these 121 he would have gained exactly 2% of their purchase weight are 433.

In short, I would find it easier to believe in the Tooth Fairy t to believe that the 121 heifers purchased by respondent on Dec ber 1, 1978, instead of losing weight from their transportation handling, actually gained exactly 2% while in respondent's during the short time between their arrival at Pittsfield and t departure.[54]

The same 11 circumstances referred to above lead me to i that respondent's scale tickets for the 121 heifers in Transactio were fabricated, without any livestock on the scales, to cover up fraud. The five scale tickets for Transaction 14 are reproduce § IX(C), *infra*. Three scale tickets show printed weights of the h ers (RX 77-79), and two show printed weights of the steers (RX 76). The livestock was allegedly weighed in lots of 20 to 25 he and the printed weights exactly total the invoice weight for the steers and 121 heifers sold to Lowder on December 2, 1978.

The scale tickets, which I infer were printed without any li stock on the scales (at least as to the heifers), show as weigher S," "G.S.," and a third initial that is illegible. Hence, the fabrica scale tickets make it appear that the job of weighing the 191 he

[54] This is one of the transactions in which complainant now concedes that truck stopped in Pittsfield enroute to Allen, Kansas.

took two or three persons. But since the total weight of the 121 heifers was not determined by respondent's scale but, rather, by his pocket calculator, the scale tickets for the 121 heifers are a complete fraud.

It makes no real difference when the scale tickets were fabricated, but I infer that they were fabricated on the same day that the invoice to Lowder was prepared, so that they would be in the proper serial number sequence.

G. Respondent Would Have Lost $321.63 in Transaction 14 Without Padding the Weight. By Padding the Weight, He Made a Profit of $327.13, Which Is $192.05 More than the Profit a Legitimate Order Buyer Would Have Made, and Respondent Could Have Undercut a Legitimate Order Buyer by 85¢ Per Cwt.

Since respondent was selling livestock to Lowder as a dealer, and not as an order buyer buying on a commission basis, it was appropriate for respondent to charge Lowder whatever the traffic would bear.

Respondent made a net profit of $327.13 on the 121 heifers in Transaction 14.[55] Since respondent's profit due to padding the weight 1,080 pounds was $648.76 (10.80 ×$60.07 (JO Ref. 94, p. 107) = $648.76), respondent's net loss would have been $321.63 without padding the weight ($648.76 −$327.13 = $321.63).

A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $135.08 on these 121 heifers ($.25 ×540.30 = $135.08), or $192.05 less than the profit respondent made ($327.13 −$135.08 = $192.05).

Moreover, by padding the weight, respondent was able to substantially undercut any legitimate dealer. Respondent paid $59.64 per cwt for the 121 heifers ($32,223.13[56] ÷540.30 = $59.64). It would take approximately $1.03 per cwt to cover his transportation cost ($1.03 ×540.30 = $556.51). Hence a legitimate dealer would have had to charge $60.92 per cwt for these heifers, if he wanted to make 25¢ per cwt commission ($59.64 + $1.03 + $.25 = $60.92).

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[55] Respondent's expenses: $21,716.58 (89 head) (JO Ref. 112, p. 117), $10,506.55 (32 head) (JO Ref. 115, p. 117); $554.32, transportation (121 ÷191 ×$875 (CX 14, p. 21) = $554.32); Total expenses, $32,777.45; Respondent received $33,104.58 (JO Ref. 95, p. 107); Net profit: $327.13 ($33,104.58 −$32,777.45 = $327.13). (Respondent's "self" insurance charge, which he collects from customers, is excluded both from respondent's expenses and his receipts, so it has no effect on his net profit. In other transactions, his "self" insurance charge is included in both his expenses and receipts, and similarly has no effect on his net profit.)

[56] $21,716.58 (JO Ref. 112, p. 117) + $10,506.55 (JO Ref. 115, p. 117) = $32,223.13.

Respondent's invoice price of $60.07 (JO Ref. 94, p. 107) was 85¢ per cwt less than a legitimate dealer would have charged ($60.92 −$60.07 = $.85), earning 25¢ per cwt commission, whereas respondent made $192.05 more than the legitimate dealer would have made, even though respondent charged Lowder 85¢ per cwt less than a legitimate dealer would have been required to charge. As shown in § XIX, *infra*, Mr. Lowder indicated that he buys from respondent because respondent underprices other dealers.

H. There Is No Relevant Trucker Testimony. The Customer, Lowder, Felt that Respondent Was Delivering Livestock to Him Cheaper than the Price He Had Been Paying, and Lowder Was Satisfied with the 6% Shrink Generally Experienced on Respondent's Livestock.

The M&I Truck Line was paid $875 for hauling the 191 steers and heifers to Lowder on December 2, 1978 (CX 14, p. 21). There is no relevant testimony by the trucker as to this transaction. Complainant concedes on remand that the truck stopped in Pittsfield enroute to Allen, Kansas.

Although Mr. Lowder was a satisfied customer and had no complaints as to respondent, he reweighed livestock received from respondent, and it shrank an average of about 6% (Tr. 58–64). Neither Mr. Lowder nor anyone else has the ability to determine whether a particular load of livestock received from respondent shrank 6%, or whether the livestock actually shrank 4%, and 2% shrink resulted from respondent's weight padding.

Moreover, Lowder's satisfaction with respondent's livestock was based, in part at least, on the fact that respondent was delivering livestock to him cheaper (because of weight padding) than Lowder had been paying (Tr. 64). Hence Lowder's "satisfaction" was based on respondent's deception.

In any event, however, the sanction imposed for serious violations of the Packers and Stockyards Act is not reduced merely because the violator's customers are satisfied with their business dealings with the violator (§ XIX, *infra*).

III. In Transaction 5, the Trucker's Affidavit that He Hauled "43 Steers" from "Kansas City, Missouri, to Mr. Gentry's Farm About (3) Three Miles Outside of Hannibal, Missouri," and that They Went "Straight Through and Were Not Unloaded Until I Made Delivery at Mr. Gentry's Farm Near Hannibal, Missouri," Which Is Not Undercut by His Testimony (Taken in Context), and Nine Other Circumstances Compel Me to Infer that the 43 Steers Sold to Malcolm H. Gentry on September 1, 1978, Were the Same 43 Steers Purchased by Respondent the Day Before in Kansas City as Lot No. 68 (to Which Respondent Added Exactly 2% to the Weight by Pencil), Rather than an Inadvertent Mixture of Lot Nos. 68 and 65, as Claimed by Respondent, and that Respondent's Worksheet and Scale Ticket Were Fabricated to Cover Up His Fraud.

A. On August 31, 1978, Respondent Purchased 43 Steers Weighing 26,730 Pounds as Kansas City Lot No. 68, to be "Shipped to Gentry" Via "Douglas" Trucking. He Invoiced Gentry the Next Day for 43 Steers Weighing 27,265 Pounds (Exactly 2% More than Respondent's Purchase Weight of Lot No. 68).

Respondent's Kansas City purchase invoice dated August 31, 1978, for Lot No. 68 is reproduced on the next page (CX 5, p. 6; identical to RX 29). Respondent's carbon copy of his invoice to Malcolm H. Gentry, Hannibal, Missouri, the customer, dated the next day, is reproduced on the following page (RX 33).

Kansas City Invoice For Lot No. 68, August 31, 1978 (CX 5, p. 6)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

526 LIVESTOCK EXCHANGE BUILDING — KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-233-5255
SAM CAMPBELL 816-313-5276
J. HAROLD SCHMIDT 816-331-4616
ED GORMAN Bonner Springs, Kansas 913-721-2068
WILL M. CORSON 913-432-0046
OFFICE
GLORIA EVANS

Area Code 816
PHONE 842-3255

Bought for the Account of —
GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

147 → Date 31 August 1978, 19__
148 → Shipped to Scott
150 → Saylor Douglas
149 → NO. 68

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	25	[illegible]			6125	[illegible]	[illegible]	[illegible]	
[illegible]	16				6645	1269	[illegible]	[illegible]	
[illegible]	5				2655	1231	[illegible]	[illegible]	
[illegible]	13				7625	1655	[illegible]	[illegible]	
151 →	43		152 →		21230				16[illegible]-119

153 → Average Weight 627
Average Cost $60.42

VACC., DEHORNING, BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	
COMMISSION	[illegible]
TOTAL	154 → 16,[illegible]

GEORGE W. SAYLOR, JR.
Volume 44 Number 6

Transaction 5 Invoice Copied From Respondent's Records (RX 33)

GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363
PHONE (217) 285-6186
(217) 285-4011

155 → DATE [illegible] 1 19 28

SOLD TO [illegible]

NO.	KIND	WEIGHT	PRICE	AMOUNT
[illegible]	[illegible] KC	[illegible]	[illegible]	[illegible]
156	7,114 634#	159 →	[illegible]	5520
			160 →	12,161 75
	[illegible]			
	Respondent's Exhibit # 33			
	[illegible]			

#2700 161

16,155.92

Signed

WE APPRECIATE YOUR PATRONAGE

The Kansas City purchase invoice for Lot No. 68 (JO Ref. 149, p. 143) dated August 31, 1978 (JO Ref. 147, p. 143), shows that the livestock was to be "Shipped to Gentry" (JO Ref. 148, p. 143), "Via Saylor-Douglas" (JO Ref. 150, p. 143), *i.e.*, "McGlauchlen Trucking, Douglas Transit, Inc." (CX 18, pp. 2, 4). Kansas City Lot No. 68 is for 43 steers (JO Ref. 151, p. 143) weighing 26,730 pounds (JO Ref. 152, p. 143).

Respondent's invoice to Gentry, dated September 1, 1978 (JO Ref. 155, p. 144), the day after respondent's purchase of Lot No. 68, is for 43 steers (JO Ref. 156, p. 144) weighing 27,265 pounds (JO Ref. 157, p. 144), *i.e.*, 535 pounds more than the purchase weight of Lot No. 68 (27,265 −26,730 = 535). This is *exactly* 2% more than respondent's purchase weight the day before. That is, a person using a pocket calculator to add exactly 2% to the purchase weight would read 534.6 on the calculator (.02 ×26,730 = 534.6), which rounds to 535.[57]

B. On August 31, 1978, Respondent Also Purchased 64 Steers as Kansas City Lot No. 65, to be Shipped to Pittsfield via "M&I" Truck Line, Inc. Respondent's Worksheet and Testimony Claim that Lot Nos. 68 and 65 Were Inadvertently Mixed by the Trucker, and Respondent Sorted Out 43 Head at Pittsfield from the Mixture, Weighing 27,265 Pounds, Which Were Sent to Gentry.

Respondent's Kansas City purchase invoice dated August 31, 1978, for Lot No. 65 is reproduced on the next page (RX 30), and respondent's worksheet for Transaction 5 is reproduced on the following page (RX 32).

[7] For a discussion as to why respondent rounded his pocket calculator increases exactly 2% or exactly 3% to the nearest 5 pounds, see § I(A), *supra*.

Kansas City Invoice For Lot No. 65, August 31, 1978 (RX 30)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

528 LIVESTOCK EXCHANGE BUILDING — KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3205
SAM CAMPBELL 816-333-5311
J. HAROLD SCHMIDT 816-331-4858
ED GORMAN Bonner Springs, Kansas 913-721-2389
WILLIS CORSON 913-432-0046
OFFICE
GLORIA EVANS

Area Code 816
PHONE 842-1255

162 → Date 31 August 1978, 19..

Bought for the Account of —
GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

165 → NO. 65

163 → Shipped to
164 → Via

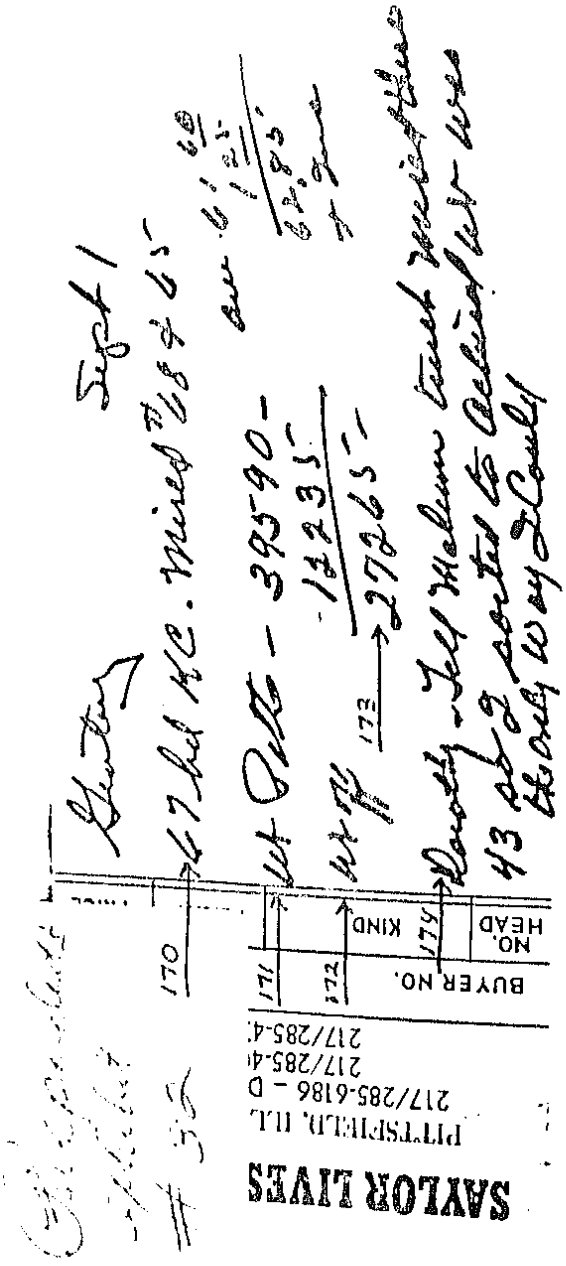
PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	10	46			5625	717.74	64c	3[illegible]	
	8				1125		62c	7[illegible]	
[illegible]	39				16955	16.54	65c	110[illegible]	
[illegible]	2				2250	16.38	63.80	1494.58	
[illegible]	5				2465	13.55	65c	[illegible]	
[illegible]	6				3135	17.43	54.40	1[illegible]	
166	169 → 64		168 →		37055				23214

Average Weight 579 169
Average Cost 64.10

VACC. DEHORNING BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (HAIL)	
THRU FREIGHT	
FEED	32[illegible]
COMMISSION	
TOTAL	23[illegible]
CASH	

Respondent's Exhibit 1 #30

Respondent's Transaction 5 Worksheet (RX 32)



Respondent purchased Lot No. 65 (JO Ref. 165, p. 146) on August 31, 1978 (JO Ref. 162, p. 146), the same day on which he purchased the 43 steers in Lot No. 68, referred to above. Lot No. 65 consisted of 64 steers (JO Ref. 167, p. 146) weighing 37,055 pounds (JO Ref. 168, p. 146). The invoice for Lot No. 65 does not show the name of respondent's customer (JO Ref. 163, p. 146), so it necessarily would have been transported to Pittsfield. However, it was shipped "Via M&I" (JO Ref. 164, p. 146), *i.e.*, M&I Truck Line, Inc. (see, *e.g.*, CX 2, p. 14), which is a different trucking company from McGlauchlen Trucking, Douglas, Transit, Inc., used to transport the 43 steers "to Gentry" in Lot No. 68 (JO Ref. 148, 150, p. 143).

Respondent's worksheet for Transaction 5 shows that Kansas City Lot Nos. 68 and 65 were mixed (Jo Ref. 170, p. 147), and his note at the bottom of the worksheet purports to give instructions to his bookkeeper, Mrs. Dorothy Manson, *viz.*: "Dorothy—tell Malcolm truck mixed these 43 so I sorted to achieve wt was the only way I could" (JO Ref. 174, p. 147).

The worksheet shows that the Pittsfield weight of 67 head from the mixed Lot Nos. 68 and 65 was 39,590 pounds (JO Ref. 170, 171, p. 147), that an unspecified number of animals were weighed off at 12,235 pounds (JO Ref. 172, p. 147), resulting in the weight invoiced to Gentry of 27,265 pounds (JO Ref. 173, p. 147; JO Ref. 157, p. 144). Since 67 head allegedly weighed 39,590 pounds, and the invoice weight to Gentry of 27,265 pounds was for 43 head, obviously 24 head were allegedly weighed off at 12,235 pounds (67 −43 = 24).

Neither respondent nor his bookkeeper, Mrs. Manson, recalled anything about the mixing of the two loads, but relied solely on the worksheet. Their testimony as to this transaction, which is very brief, is set forth below. In reading their testimony, keep in mind the fact that, according to the documentary evidence, *i.e.*, the Kansas City invoices, the 43 steers in Lot No. 68 were to be shipped "to Gentry" via Douglas Trucking, and the 64 steers in Lot No. 65 were to come to Pittsfield via M&I Truck Line, Inc.

Respondent testified as to Transaction 5 (Tr. 326–28):

> By Mr. SCHIMMEL:
>
> Q. Mr. Saylor, would you take Exhibits Nos. 29 to 33 in regard to Mr. Gentry, 43 head of livestock. Now, I notice these came from Kansas City?
>
> A. Yes, sir.
>
> Q. And it is Lot No. 68 and 65. Were those mixed when they came in?

A. Evidently they had been.

Q. How do you know that? Is that from Respondent's Exhibit No. 32 [worksheet]?

A. Yes, that is what I am looking at. It says "mixed 68 and 65." I see that I have made a note here as to such down at the bottom here for some reason or another.

Q. You tried to resort them back, is that what you did?

A. Yes, sir. It looks like it has been that way.

Q. Can you tell what shrink you had on these?

A. No, I would take it that this deal here had to be a straight reweigh after he got it off.

Q. Is it evident on that that you did not charge him any shrink on this particular group of cattle?

A. I would say that there is none shown so they would have to be just a straight weight at whatever they weighed out.

Q. That came because the lots were mixed, is that it?

A. I would, at this time, that would be the only thing I would know.

Q. O.K.

A. I see here that we have had, evidently 43 cattle at one time that we thought we was going to come straight with [58] and I suppose somehow or another they have got tangled up somewhere along the line so we had to just weigh out 43 head of cattle.

Mrs. Manson similarly had no recollection of the mixing, and her explanation is similar to that of respondent. She testified (Tr. 152-54, 255-56):

A. That [RX 29] is a purchase sheet from the Kansas City Livestock Order Buyers for forty-three steers.

By Mr. SCHIMMEL:

Q. What is Exhibit No. 30?

---

[58] As shown in § I(F)(1), *supra*, respondent uses the terminology "to come straight with" to mean that the shipment is to come straight through from the purchase point to the customer, without running them through respondent's feed yard at Pittsfield (see Tr. 302).

A. It is a purchase sheet from Kansas City LIvestock Order Buyers for sixty-four steers.

Q. What is Respondent's Exhibit 31?

A. It is a scale ticket to Mr. Gentry, where cattle was sorted out of Kansas City Buyer No. 65 and No. 68.

Q. How many head of cattle were sorted out?

A. Forty-three.

Q. Do you have a recollection as to No. 65 and Load No. 68, whether they were mixed or not when they came in?

A. No, I could not tell you whether they were mixed for sure or not but, if you notice your different drafts, you will notice the different sizes in the cattle.

Q. Would you look at Respondent's Exhibit 32 [work-sheet] and decipher that for us, please?

A. O. K. There was sixty-seven head, Kansas City, and they were mixed with the "68"s, the "68"s and the "65"s.

In Pittsfield, they weighed 39,590. They weighed off—wait a minute.

O. K. This was on the load that they were mixed. George sorted them, to try to get the cattle back, the ones that he thought were the—whatever the "68"s buying—yes, which would be the Buyer No. 68, which we—

I cannot get this one through my head. O. K. The cattle that came in on the truck weighed 39,590 [59] and George sorted that bunch. He took 12,235 off, coming up with 27,265 as the weight on those cattle that he sent to Malcolm Gentry.[60]

Q. You do not know how the two lots got mixed when they got on the truck?

---

[59] This is the alleged weight of 67 head (JO Ref. 170, 171, p. 147). Keep in mind that the M&I Truck was only carrying 64 head (JO Ref. 167, p. 146) to Pittsfield, and Douglas Trucking was carrying only 43 head (JO Ref. 151, p. 143) "to Gentry" (JO Ref. 148, p. 143).

[60] As discussed below, 39,590 − 12,235 = 27,355, not the invoice weight of 27,265. But adding 2% by pocket calculator to the purchase weight of Lot No. 68 equals the invoice weight of 27,265!

A. Very possible, a gate could have got open, which that happens.

Q. Could they have also gotten mixed up in Kansas City before they were loaded?

A. Sure.

If they are not full loads, they fake cattle off of different buyer numbers and make a full load. We do not run a truck empty. We have drivers that a lot of times do not watch their drive-out sheets.

Q. Then Exhibit No. 33 was the billing that you prepared on that?

A. Yes.

Q. And that was for the 27,265, as was set up with the balance of that load?

Judge WEBER: The 27,265 was the weight you billed the cattle out to Gentry——

The WITNESS: Right.

* * * * * * *

Q. Let me see if I understand what this worksheet tells us; that there were a total of 67 head purchased in Kansas City that were mixed lots 68 and 65, right?

A. Yes.

Q. And when those two lots arrived in Pittsfield, they weighed 39,500 pounds, is that right?

A. Yes.

Q. Then, there were an unidentified number of cattle taken off that weight 12,235, is that right?

A. Yes.

Q. Leaving a weight of 27,265, which is the weight that was billed to Mr. Gentry, correct?

A. Right.

Q. We don't have any scale tickets for 39,590 or 12,235, do we?

A. No.

Q. Mrs. Manson, is Mr. Saylor's scale in Pittsfield a standard livestock scale, to your knowledge?

A. Standard?

Q. Yes.

A. It is state-inspected, if that is what you are meaning.

Q. That was a bad question; let me ask it again. Are the livestock weighed on the truck or are they taken off the truck and weighed?

A. They are taken off the truck.

Q. So, what apparently happened here was that all the livestock were taken off the truck, and then all of them were weighed, and there were, then, a number of them from that group that were bunched together and they were weighed separately, and, then, the remaining number was weighed?

A. Yes, I would say that he tried to sort out the 43 head which he thought—to size them, and done them according to the weight size to sort Malcom out a load.

Q. Mrs. Manson, how many livestock of average weight, around 600 pounds, can be placed on Mr. Saylor's scale at one time? Approximately?

A. I don't weigh that much. I couldn't give you an answer, 25, 27, probably more, I just don't know.

Neither respondent nor Mrs. Manson gave a logical explanation as to how respondent happened to weigh, at Pittsfield, a 67-head mixture from Lot Nos. 68 and 65, when Lot No. 68 consisted of 43 steers to be shipped "to Gentry" via Douglas Trucking and Lot No. 65 consisted of 64 steers to be shipped to Pittsfield via M&I Truck Line, Inc. Moreover, as shown below, the mixture never occurred.

C. The Affidavit of the Trucker for Lot No. 68, that He Hauled "43 Steers" from "Kansas City, Missouri, to Mr. Gentry's Farm About (3) Three Miles Outside of Hannibal, Missouri," and that They Went "Straight Through and Were Not Unloaded Until I Made Delivery at Mr. Gentry's Farm Near Hannibal, Missouri," Which Is Not Undercut by His Testimony (Taken in Context), Is Decisive for Complainant in Transaction 5.

Mr. Donald D. McGlauchlen (nephew of truck driver Derald McGlauchen, who also testified in this case (Tr. 77)) [61] was a driver for "McGlauchlen Trucking, Douglas Transit, Inc." (CX 18, pp. 2, 4), which is the trucking firm shown on the Kansas City invoice for Lot No. 68 (JO Ref. 150, p. 143). Mr. McGlauchlen signed an affidavit 7 months and 1 week after the transaction which, except for the first and last page of printed boiler plate, consists of only five sentences. The affidavit states that the 43 steers delivered to Gentry's farm from Kansas City "went straight through and were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri." The entire affidavit, except for the boiler plate, states (CX 18, p. 4):

Affidavit of Donald D. McGlauchlen

> My name is Donald D. McGlauchlen and I live at 429 East Washington, Pittsfield, Illinois. I am a driver for McGlauchlen Trucking, Douglas Transit, Inc. located in Milton, Illinois.
>
> On or about September 1, 1978, I hauled 43 steers from the stockyards at Kansas City, Missouri, to Mr. Gentry's farm about (3) three miles outside of Hannibal, Missouri. These 43 steers went straight through and were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri. Also included on this load from Kansas City were 11 heifers which I delivered to George Saylor's stockyards about (5) five miles west of Pittsfield, Illinois.

Mr. McGlauchlen's affidavit is a "smoking gun," an eye witness account squarely contrary to respondent's claim that the 43 steers were mixed with another lot and sorted at Pittsfield before being shipped to Gentry. Mr. McGlauchlen makes three points in his affidavit, only the second of which is important.

Mr. McGlauchlen's first point is that the 43 steers hauled "from the stockyards at Kansas City, Missouri, to Mr. Gentry's farm about (3) three miles outside of Hannibal, Missouri . . . went straight through. . . ." I interpret that to mean that the 43 steers did not pass through Pittsfield, Illinois, enroute to Hannibal, Missouri. The expression "bringing livestock straight through" was also used by respondent when he was referring to transactions

[61] The spelling of Donald D. McGlauchlen is accurate since his signature on his ıvit is legible (CX 18, p. 3). In the transcript, there is no "l" before the "en" in d McGlauchen's name (Tr. 75).

where "we don't go to the trouble of going through the [Pittsfield] feed yards" (Tr. 302; see § 1(F)(1), *supra*). In any event, however, it is immaterial whether the livestock passed through Pittsfield and were then back hauled to Hannibal, Missouri.

Mr. McGlauchlen's second point is that "*[t]hese 43 steers* went straight through and *were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri*" (emphasis added). That is important! In fact, it is decisive as to Transaction 5.

Even if it is assumed (erroneously, I believe) that when Mr. McGlauchlen said (in the first point) that the 43 steers "went straight through," he did not mean to exclude a stop at Pittsfield, Illinois, enroute to Hannibal, Missouri, and even though Mr. McGlauchlen did not remember when he testified at the hearing whether the 43 steers went through Pittsfield or not, that does not in any manner undercut his second point that these 43 steers "were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri."

Respondent's attorney attacks only the first point, *i.e.*, he contends (erroneously) that Mr. McGlauchlen's testimony (as distinguished from his affidavit) indicates that the 43 steers did pass through Pittsfield enroute to Hannibal, Missouri. As shown below, his attack fails. But even if it were successful, it is immaterial whether the 43 steers went through Pittsfield as long as they "were not unloaded" until they got to Mr. Gentry's farm. If they were not unloaded in Pittsfield, they could not have become mixed with Lot No. 65, as claimed by respondent.

Mr. McGlauchlen's third point is that his load also included 11 heifers, which he did deliver to Pittsfield. This is not important, but it explains why Mrs. Manson's check stub for her check to McGlauchlen Trucking shows payment for hauling 54 steers (actually 43 steers and 11 heifers) from "K.C.-Pitts" (CX 5, p. 9). The fact that Mrs. Manson's check stub does not show the intervening stop in Hannibal, Missouri, is not significant. For example, in Transaction 9, in which the livestock was transported from Kansas City to Jacksonville, Illinois, with an intervening stop at Pittsfield, Mrs. Manson's check stub merely shows "K.C.-Jacksonville" (CX 9. p. 9).[62]

Respondent's attorney argues (Respondent's Reply to Complainant's Opening Brief On Remand at 7):

[62] Even under respondent's claim, the livestock was ultimately hauled to Hannibal, Missouri, but Mrs. Manson's check stub relating to the transportation charge fails to mention Hannibal, Missouri. The fact that the check stub is silent as to Hannibal, Missouri, does not help either party.

> Any practicing lawyer would have to admit that when he drafts an affidavit for an affiant to sign invariably the affidavit bears as much of the opinion of the draftsman as of the affiant. Understandably, when Mr. McGlauchlen was approached several months after the transaction and asked to sign an affidavit after it was written out by the investigator Mr. McGlauchlen did not know the significance of the affidavit. He would not have known that the question of whether or not the truck stopped at Pittsfield was in issue.

Whether the truck *stopped at Pittsfield* is not, of course, the issue. The issue is whether the 43 steers in Lot No. 68 were *unloaded at Pittsfield* and mixed with Lot No. 65. Mr. McGlauchlen would have to be incredibly naive not to have understood that it was important as to whether the 43 steers were unloaded before delivery to Mr. Gentry's farm. Aside from the boiler plate, the affidavit consists of only five sentences, the first two of which merely state his name and trucking company. Hence Mr. McGlauchlen knew that two USDA investigators came all the way to see him just to get him to swear to three sentences. It strains credulity to the breaking point to accept respondent's attorney's view that Mr. McGlauchlen did not understand the significance of what he was saying under oath.

Moreover, if we look at the handwritten version of the affidavit, it is even more dramatically demonstrated that Mr. McGlauchlen knew that whether or not the 43 steers were unloaded prior to delivery at Mr. Gentry's farm was highly significant. The handwritten affidavit is set forth on the next three pages (CX 18, pp. 1–3).

Affidavit Of Truck Driver Donald D. McGlauchlen (CX 18, pp. 1-3)

United States Department of Agriculture

PACKERS AND STOCKYARDS ADMINISTRATION

AFFIDAVIT

FOR USE IN ANY PROCEEDING OR ACTION
UNDER THE PACKERS AND STOCKYARDS ACT, 1921,
AS AMENDED AND SUPPLEMENTED (7 U.S.C. 181 et seq.)

STATE OF Illinois)
) SS:
COUNTY OF Pike)

BEFORE ME, William Jeffrey Kostelecky,
an employee of the United States Department of Agriculture, designated by the Secretary of Agriculture under authority of the Act of January 31, 1925, 43 Stat. 803, 7 U.S.C. 2217, personally appeared

Donald D. McGlauchlen
(NAME)

429 East Washington, Pittsfield, Ill.
(HOME ADDRESS)

McGlauchlen Trucking, Douglas Transit, Inc.
(FIRM)

P.O. Box 127, Milton, Illinois
(FIRM ADDRESS)

who deposes and says:

-2-

My name is Donald D. McGlauchlen and I live at 429 East Washington, Pittsfield, Illinois. I am a driver for McGlauchlen Trucking, Douglas Transit, Inc. located in Milton, Illinois.

On or about September 1, 1979, I hauled 43 steers from the stockyards at Kansas City, Missouri to Mr. Gentry's farm about (3) three miles outside of Hannibal, Missouri. These 43 steers went straight through and ~~they~~ DDM were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri. DDM Also included on this load from Kansas City were 11 hogs which I delivered to George Saylor's stockyards about (5) five miles west of Pittsfield, Illinois DDM

GEORGE W. SAYLOR, JR.
Volume 44 Number 6

This statement consists of 3 pages of which this is page 3.

I have read the foregoing statement and it is true and correct. I give such statement freely and voluntarily, without threats or promises having been made, knowing that it may be used in the administration of the Packers and Stockyards Act, 1921, as amended, and the regulations thereunder.

Donald D. McGlaughlin
(SIGNED)

SUBSCRIBED AND SWORN TO before me at 11:20 A.M., on this 9th day of April, 1974.

W. Jeffrey Kistler
Employee of the United States Department of Agriculture, designated pursuant to law to administer oaths,

Authorization No. 190

WITNESS:

William E. Gentry

Note that complainant's auditor, Mr. Kostelecky,[63] had Mr. McGlauchlen initial a correction in the middle of the vital, fourth sentence between the key words "went straight through" and "were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri." That would have focused his attention on this part of the affidavit. Moreover, Mr. Kostelecky had Mr. McGlauchlen sign his initials at the end of that vital sentence. (Mr. McGlauchlen further initialed the next sentence ending the affidavit, but this is not significant since the Department's investigators frequently have an affiant initial the end of the affidavit showing that no additional material was added later.)

Having Mr. McGlauchlen initial the end of the sentence stating that "[t]hese 43 steers went straight through and [initials DDM over correction] were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri [initials DDM]," emphasized the vital significance of that sentence. There is no basis whatever for giving anything less than full faith and credit to this affidavit, which is decisive as to this transaction.

Three years and 3 months after the transaction, Mr. McGlauchlen testified as a witness in this proceeding. Not only was this a considerable time after the event, but, in addition, Mr. McGlauchlen's status had changed drastically. When he gave the affidavit, he was a driver for McGlauchlen Trucking, Douglas Transit, Inc. (CX 18, pp. 2, 4). When he testified at the hearing, he was a full-time employee of respondent. He testified (Tr. 99):

> Q. What is your occupation?
>
> A. Truck driver.
>
> Q. By whom are you employed?
>
> A. Saylor Livestock.
>
> Q. How long have you been so employed by Mr. Saylor?
>
> A. For 18 months.
>
> Q. Before that by whom were you employed?

---

[63] I infer that Mr. Kostelecky wrote the affidavit, and took the lead during the questioning of Mr. McGlauchlen (which would have occurred before the affidavit was prepared), since Mr. Kostelecky's name appears on the first page, and Mr. Gentry's name appears on the last page as "WITNESS." Similarly, I infer that Mr. Gentry (no relation to the customer in Transaction 5) wrote the affidavits of the four farmers and took the lead during their questioning because his name appears on the first page of each of their affidavits.

A. Douglass Transit, Milton, Illinois.[64]

Mr. McGlauchlen testified that the signature on the affidavit is his, but that he did not remember giving the affidavit. He testified (Tr. 100-01):

> Q. Do you have any recollection of talking with people from the Packers and Stockyards Administration some time after you hauled those livestock?
>
> A. What people would you be referring to, sir?
>
> Q. Mr. Ed Gentry or Jeff Kasteleki?
>
> A. No, sir, honest to God, I do not. I do not. I signed that statement there but I do not remember.
>
> Mr. HEINZ: Complainant offers for identification a four-page document.
>
> By Mr. HEINZ:
>
> Q. Mr. McGlauchlen, I am handing you a copy of the exhibit identified as complainant's Exhibit 18 for identification and ask that you look at the third page of that document.
>
> A. The third page?
>
> Q. Right, there is a signature. Is that your signature, Mr. McGlauchlen?
>
> A. Yes, it is. I swear I don't remember.

Mr. McGlauchlen's testimony as to the hauling of the 43 steers, taken in context, does not in any manner undercut his affidavit. Nonetheless, respondent's attorney takes his testimony out of context and features him as a star witness for respondent (*e.g.*, Re-

---

[64] There is no need to draw an inference as to whether the complaint in this case had anything to do with Mr. McGlauchlen's employment by respondent, but it is possible. The complaint was filed April 22, 1980. Press releases are issued by the agency with respect to every complaint, targeted particularly to the respondent's trade area. (In *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 188 (1973), the Court upheld a suspension order under the Act notwithstanding the "damaging publicity" issued by the agency. *Accord*, *Miller* v. *Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *Bowman* v. *USDA*, 363 F.2d 81, 86 (5th Cir. 1966)). Mr. McGlauchlen began working for respondent about the first of June 1980 (Tr. 99), a little over a month after the issuance of the complaint. Mr. McGlauchlen, realizing that his affidavit would likely be used against respondent, could have mentioned this matter to respondent, which could have influenced respondent's selection of a new truck driver. But I draw no inference in this respect.

spondent's Proposed Findings on Remand at 13) since he testified (in the nature of a general rule) that "[a]ll my cattle but fat cattle were brought to Saylor's and then I was told where to go with them" (Tr. 100). Since the 43 steers delivered to Mr. Gentry at Hannibal, Missouri, were not "fat cattle" (which are delivered to packing plants for slaughter), respondent's attorney draws the conclusion that these 43 steers "were brought to Saylor's."

As shown above, it is immaterial whether these 43 steers "were brought to Saylor's" because, even if they were, Mr. McGlauchlen states in his affidavit, not contradicted by his testimony, that these 43 steers "were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri" (CX 18, p. 4).

But, even if it were not immaterial whether these 43 steers "were brought to Saylor's," five times Mr. McGlauchlen testified that he was not sure whether the 43 steers went directly to Gentry's or whether they went first to Saylor's. Hence five times Mr. McGlauchlen refused to apply his general rule—that "[a]ll my cattle but fat cattle were brought to Saylor's"—to the particular 43 steers involved in Transaction 5.

A careful analysis of Mr. McGlauchlen's testimony, quoted immediately below, demonstrates that his testimony, taken in context, is not at all inconsistent with (the immaterial) point one of his affidavit (as to whether the 43 steers went "straight through"). Mr McGlauchlen's five refusals to draw respondent's attorney's conclusion from Mr. McGlauchlen's general rule are numbered by the Judicial Officer. Mr. McGlauchlen testified (Tr. 99–100, 102; emphasis added):

> Q. Mr. McGlauchlen, do you recall hauling any livestock in the fall of 1978, from Kansas City, Missouri to a M.H. Gentry near Hannibal, Missouri?
>
> A. Yes, sir, I hauled several loads.
>
> Q. Do you remember a one load of 43 steers that you hauled near the first of the month of September 1978?
>
> A. Yes, sir, I say I do.
>
> Q. Did those 43 head go directly from Kansas City to M.H. Gentry's farm?

honestly say if this was one of the times I went to Gentry's or not [Second Refusal].[65] I honestly can't [Third Refusal]. I do remember 43 steers coming out of Kansas City because I had some heifers with them.

Q. Do you remember the total number of head on that load?

A. Yes, sir.

Q. How many were there?

A. There were 52.

Q. You dropped off 43 and there would be nine more head?

A. I remember 52, yes, I do.

Q. Is it possible there could be 54?

A. You are taking me back several years. I am almost sure this particular load was 52, this particular load. But like I said, I hauled several loads of cattle.

* * * * * * *

CROSS-EXAMINATION

By Mr. SCHIMMEL:

Q. Mr. McGlauchlen, you don't have any recollection, then, on this particular time as to whether you delivered the steers directly to the Gentry farm from Kansas City or whether you brought them to Saylor's and then delivered them to the Gentry farm?

A. I am sure this particular load I cannot honestly say [Fourth Refusal], because I have delivered several different loads and back that far I do not remember [Fifth Refusal].[66]

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[65] This sentence directly implies, or virtually states, that on some occasions, Mr. McGlauchlen took feeder livestock to Gentry's farm without going to Saylor's first. Since Mr. Gentry is a farmer, not a packer, Mr. McGlauchlen would never deliver "fat cattle" to Gentry's farm. Hence this sentence shows that Mr. McGlauchlen's general rule that "[a]ll my cattle but fat cattle were brought to Saylor's" was not universally true. If it were universally true, Mr. McGlauchlen would not have refused, five times, to apply it to the 43 steers involved in Transaction 5.

[66] This sentence also implies that Mr. McGlauchlen delivered some loads of feeder cattle directly to Mr. Gentry's farm without first going to Saylor's (see note 65, *supra*).

Q. As a matter of fact, is there a compartment on your trailer that would hold 11 heifers?

A. Yes, there is. My nose of my trailer would hold them and that is the way they would be loaded, six and five. I believe there was nine but this says eleven. I remember this particular load, I believe there were nine.

Respondent's attorney erroneously employs syllogistic reasoning with respect to Mr. McGlauchlen's testimony. The textbook example of syllogistic reasoning consists of a major premise, a minor premise, and a conclusion. For example:

Major Premise: All men are mortal.

Minor Premise: Paul is a man.

Conclusion: Paul is mortal.

Respondent's attorney's syllogistic reasoning as to Mr. McGlauchlen's testimony is:

Major Premise: All my cattle but fat cattle were brought to Saylor's and then I was told where to go with them.

Minor Premise: These 43 steers were not fat cattle.

Conclusion: These 43 steers were brought to Saylor's.

There are two reasons why syllogistic reasoning is inapplicable here. First, Mr. McGlauchlen, the witness who gave the major premise, refused to apply that major premise to the facts of this case five times. When the author of the major premise five times refused to apply it to the facts of this case, the major premise would seem to be a slender reed upon which to rely as support for respondent's attorney's conclusion.

Moreover, Mr. McGlauchlen not only gave the major premise, but he gave the reason for the major premise, namely, if "I didn't see George Saylor, I didn't know where they went to" (Tr. 100).

Here, however, the documentary evidence proves that Mr. McGlauchlen did know where the 43 steers "went to." The Kansas City invoice for these 43 steers shows on its face "Shipped to Gentry" (JO Ref. 148, p. 143).

As shown in § I(C)(1)(a), *supra*, when respondent bought livestock at Kansas City, he cleared them through the Kansas City Livestock Order Buying Company, which handled all of the details for him,

including arrangements with truckers. Hence, the Kansas City Livestock Order Buying Company personnel would, pursuant to respondent's previous instructions, have directed Mr. McGlauchlen to haul the 43 steers in Lot No. 68 to Gentry. (In addition, the Kansas City personnel probably would have given Mr. McGlauchlen the Kansas City invoice to carry back to respondent.)

As Mr. McGlauchlen's testimony at the hearing shows, he admittedly knew where Gentry was located, but did not remember, at the time of the hearing, whether this was one of the transactions where he went directly to Gentry's farm, or whether he went first to Saylor's Pittsfield location. In his affidavit, made much closer to the transaction, and when he was not a full-time employee of respondent, he states unequivocally that the "43 steers went straight through and were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri" (CX 18, pp. 2, 4).

When Mrs. Manson was questioned about a similar Kansas City invoice showing livestock in Transaction 3 "Shipped to GRAF CATTLE CO." (CX 3, p. 4), she testified (Tr. 238–39):

> Q. Now, I understand that this invoice was prepared in Kansas City. How would the people who prepared it in Kansas City know that these cattle were to be shipped to Graf Cattle Company?
>
> A. By Mr. Saylor.
>
> Q. Whenever Mr. Saylor told Kansas City where to ship the livestock, we could expect that the invoice would have that destination shown as it is here, is that correct?
>
> A. The invoice?
>
> Q. This invoice (indicating).
>
> When Mr. Saylor told the K. C. people where they should go, they would type it in or write it in?
>
> A. Mr. Saylor, when he buys cattle in Kansas City, they are bought under different buying numbers.
>
> Q. Yes.
>
> A. When he buys them under different buying numbers, he thinks, "Well, this is where these cattle are going to go," so when he gets back to the office, he don't wonder who he bought these cattle for, and he usually has them put a name to who he thinks that they are going to go to on it.

Although Mrs. Manson's testimony as to Transaction 3, quoted above, if applied to Transaction 5, would cloud the issue as to whether Mr. McGlauchlen knew that the 43 steers in Transaction 5 were to be shipped directly to Gentry, I find (from the Kansas City invoice notation "Shipped to Gentry" (JO Ref. 148, p. 143)) that Mr. McGlauchlen did know where the 43 steers were to be delivered. Hence the reason underlying Mr. McGlauchlen's major premise in the syllogism is not applicable here. In this respect, it is important to recognize that Mr. McGlauchlen's testimony shows that he took some loads directly to Mr. Gentry's farm without first going to Pittsfield, but he could not remember whether this was one of the times he went directly to Gentry's.

Some of the Kansas City invoices involving purchases by respondent did not state where the load was to be shipped, *i.e.*, the "Shipped to" line was left blank on some occasions (*e.g.*, RX 11, 30, 52, 63). That would have required the trucker to haul the livestock to Pittsfield. Other Kansas City invoices showed "Shipped to Pittsfield" (*e.g.*, RX 13, 25). However, the invoice in Transaction 5 showed Mr. McGlauchlen that the steers were going to Mr. Gentry (JO Ref. 148, p. 143), and, therefore, the reason underlying his major premise, *i.e.*, that he would not know where the livestock "went to" unless he stopped at Saylor's, did not apply to Transaction 5.

It should be noted that there is nothing in Mr. McGlauchlen's testimony to suggest that he recalled any mixing of livestock in connection with the 43 steers hauled to Gentry, as claimed by respondent. He testified that "I do remember 43 steers coming out of Kansas City because I had some heifers with them" (Tr. 100).[67] Respondent's attorney did not ask any question of Mr. McGlauchlen to see whether the subject of mixing would refresh his recollection.

Since Mr. McGlauchlen was, at the time of his testimony, a full-time employee of respondent, I presume that he and respondent discussed the case before he testified. Presumably, he knew that respondent was contending that the 43 steers were mixed with another load. But, in any event, irrespective of whether respondent discussed the case with Mr. McGlauchlen, respondent's attorney, although he was well aware of the fact that respondent claimed that the 43 steers were mixed with another load, did not ask a single question in this respect on cross-examination of Mr.

[67] Mr. McGlauchlen's recollection at the hearing (when he was a full-time employee of respondent) that he hauled "43 steers coming out of Kansas City" with some heifers precludes any contention by respondent that any alleged mixing of Lots Nos. 68 and 65 occurred at Kansas City, with some unidentified truck driver bringing 67 head from the mixture to Pittsfield.

McGlauchlen. Hence there is nothing in Mr. McGlauchlen's testimony to support respondent's claim that the 43 steers were mixed with another lot.

In driving from Kansas City with the 43 steers, Mr. McGlauchlen would come to Hannibal, Missouri, before Pittsfield, Illinois, and, therefore, even in the absence of his affidavit, I would infer that he dropped off the 43 steers at Hannibal, Missouri, and then continued to Pittsfield with the 11 heifers. This would be practical not only to avoid a backhaul, but to avoid having to unload the 43 steers (and then reload them) to get to the 11 heifers in the "nose" of the trailer (Tr. 102).

But here, since Mr. McGlauchlen's testimony, taken in context, does not undercut his affidavit in any respect, and does not even deal with the decisive second point of his affidavit that the 43 steers "were not unloaded until I made delivery at Mr. Gentry's farm near Hannibal, Missouri," I give decisive weight to Mr. McGlauchlen's affidavit as to Transaction 5. That is, I would infer that respondent added exactly 2% to the weight of Kansas City Lot No. 68 even if there were no other circumstances involved in Transaction 5.

D. Nine Other Circumstances Upon Which I Base My Inference that Respondent's Invoice Weight to Gentry for the 43 Steers Resulted from His Pencil Addition of Exactly 2% to His Purchase Weight of Kansas City Lot No. 68, Which He Purchased the Day Before, and that Respondent's Worksheet and Scale Ticket Were Fabricated to Cover Up His Fraud.

Six of the circumstances common to most of the alleged reweighing transactions, upon which I rely as to Transaction 5, in addition to Mr. McGlauchlen's affidavit, are as follows:

1. The invoice weight to Gentry was exactly 2% more than the weight of the lot purchased the day before by respondent, which would have occurred, by chance, 1 time in 215 (see § I(D)(4), *supra*, and § XII(A), *infra*);

2. Respondent and his bookkeeper failed to furnish the scale tickets for the transactions prior to Mr. Kostelecky's mid-October 1978 visit, when all of respondent's records were requested on January 29, 1979 (see § IX(B), (C), *infra*);

3. None of the worksheets were furnished to complainant's investigators when all of his records were requested on January 29, 1979 (see § IX(D), *infra*);

4. Mrs. Manson wrote respondent's purchase price of Lot No. 68, $16,155.92 (JO Ref. 154, p. 143), at the bottom left-hand corner

of respondent's copy of the Transaction 5 invoice to Gentry (JO Ref. 161, p. 144), which I infer was her bookkeeping system to record the *exact* gross profit on the transaction (see § XII(D), *infra*);

5. The cumulative effect of suspicious circumstances in the other 13 transactions (see § XII(G), *infra*); and

6. The ALJ did not believe the testimony of respondent or Mrs. Manson, in part, because of their demeanor at the hearing (see § XII(H), *infra*).

The seventh additional circumstance is the fact that here, as in Transaction 4, respondent was buying the 43 steers for Gentry on a commission basis of 25¢ per cwt. Sorting would have been inconsistent with such a transaction (see § I(F)(1), *supra*). Hence there would have been no opportunity for them to become mixed with Lot No. 65 at Pittsfield. And since Mr. McGlauchlen testified that he remembered hauling the 43 steers from Kansas City to Mr. Gentry's farm (but did not remember *when he testified* whether he took them to Saylor's before unloading them at Gentry's farm), there is no possibility that they were mixed with Lot No. 65 in Kansas City.

The eighth additional circumstance is the fact that the figures on respondent's worksheet do not support his invoice weight of 27,265 pounds, but adding exactly 2% to his purchase weight does result in 27,265 pounds. Respondent's worksheet shows that he obtained 27,265 pounds (JO Ref. 173, p. 147) by subtracting 12,235 pounds (JO Ref. 172, p. 147) from 39,590 pounds (JO Ref. 171, p. 147). But that equals 27,355 pounds, not 27,265 pounds (39,590 − 12,235 = 27,355). Either the Pittsfield in-weight must be 39,500, not 39,590, or the weight off must be 12,325, not 12,235, in order to get the sale weight of 27,265 pounds (which is exactly 2% more than the purchase weight of the 43 steers).

Either error is the type that respondent could easily have made when fabricating his worksheet. That is, he undoubtedly would have used a scratch pad to concoct the figures to be transferred to his "worksheet." In copying the figures from the scratch pad to the "worksheet," he could easily have written 39,590 instead of 39,500, or 12,235 instead of 12,325. (I transpose figures in that manner all the time—I would be surprised if respondent's attorney does not find (and feature) similar errors that I may have made in copying figures from my notes to this decision.) Of course, theoretically, the error could also have been made by respondent punching the wrong figures on his calculator. But, based on all the circumstances in this transaction, I believe that it is more likely that the error was made when respondent copied his scratch pad figures onto his fabricated "worksheet."

The ninth additional circumstance is based upon my analysis of the weight figures shown for the steers purchased as Lot No. 65, which respondent claims was accidentally mixed with Lot No. 68, consisting of 43 steers. The average weight of the 43 steers purchased as Lot No. 68 was 622 pounds (JO Ref. 153, p. 143). The average weight of the 64 steers purchased as Lot No. 65 was 579 pounds (JO Ref. 169, p. 146), 43 pounds lighter than the average weight of the 43 steers. Since the 43 heavier steers were admittedly purchased for Gentry, and were only sorted because of the alleged, accidental mixing with Lot No. 65 (Tr. 152-54, 255-56, 326-28), it is consistent with respondent's story that he would have tried to sort out (and keep in inventory) the lightest steers, *i.e.*, those from Lot No. 65, and send the 43 originally in Lot No. 68 to Gentry.

As stated in § III(B), *supra*, since the alleged Pittsfield weight of the alleged 67 head mixture was 39,590 pounds, and the weight of the 43 steers remaining for Gentry, after other steers weighing 12,235 pounds were sorted off, was 27,265 pounds, that necessarily means that, according to respondent's story, 24 steers were sorted off weighing 12,235 pounds (67 −43 = 24).

To test for feasibility whether even the 24 lightest steers from the 64 steers in Lot No. 65 (or from either lot) could have been so light as to weigh only 12,235 pounds in Pittsfield, I determined the average purchase weight per head of the steers in each of the six lots of steers comprising Lot No. 65 (by dividing the purchase weight of each lot by the number of steers in the lot) (see JO Ref. 166, p. 146). The number of head, purchase weight of lot, and average purchase weight per head as to each of the six lots comprising Lot No. 65 is set forth in the following table.

Number of Head, Lot Purchase Weight, and Average Purchase Weight Per Head of Steers in Each Lot in Lot No. 65

	No. of Head	Purchase Weight of Lot (Pounds)	Average Purchase Weight Per Head (Pounds)
	10	5,625	562.5
	2	1,125	562.5
	29	16,955	584.7
	12	7,750	645.8
	5	2,465	493
	6	3,135	522.5
Total	64	37,055	

Similar figures for Lot No. 68, consisting of 43 head, are set in the following table.

Number of Head, Lot Purchase Weight, and Average Purcha Weight Per Head of Steers in Each Lot in Lot No. 68

	No. of Head	Purchase Weight of Lot (Pounds)	Average Purchase Weight Per Head (Pounds)
	15	8,725	581.7
	10	6,645	664.5
	5	3,685	737
	13	7,675	590.4
Total	43	26,730	

The 24 lightest steers from either Lot No. 65 or Lot No. 68 consist of 23 head from Lot No. 65, specifically, the two top lot the two bottom lots from Lot No. 65, *i.e.*, 10 head weighing pounds, 2 head weighing 1,125 pounds, 5 head weighing pounds, and 6 head weighing 3,135 pounds, together with 1 from Lot No. 68 with an average weight of 581.7 pounds, rounds to 580 pounds. The actual purchase weight of those 24 est steers would be as follows.

Purchase Weight of 24 Lightest Steers in Lot Nos. 65 and 6

	No. of Head	Weight (Pounds)		From Lot No.
	10	5,625		65
	2	1,125		65
	5	2,465		65
	6	3,135		65
	1	580	(average)	68
Total	24	12,930		

Note that the purchase weights for 23 of the 24 steers i table above, which are from the lighter Lot No. 65, are actual

chase weights as shown by the purchase invoice for Lot No. 65.[68] Only 1 of the 24 steers (the one from Lot No. 68) has an estimated weight.

To determine the maximum amount of shrink respondent would regard as reasonable for these 24 steers (*i.e.*, we are trying to get them as light as possible to see if the "lightest of the light" could be as light as respondent's worksheet claims they were), I used the same 29 pounds per head which respondent used in his fabricated worksheet for Transaction 4 (JO Ref. 62, p. 32), discussed in § I(B), *supra*, which is the maximum claimed shrink in any of the transactions.[69] Since the alleged 29 pounds per head (average) shrink in Transaction 4 was based on 94 steers also purchased in Kansas City, as Lot No. 62X, with an average weight of 826 pounds per head (JO Ref. 46, p. 31), or 247 pounds per head heavier than Lot No. 65 (826 −579 = 247), one would normally expect more pounds per head shrink in the heavier animals. Accordingly, 29 pounds per head shrink on the 24 "lightest" steers should be the maximum amount respondent would claim as reasonable. (In fact, it should be substantially more shrink than respondent would claim as reasonable.)

Twenty-nine pounds per head shrink on 24 steers would equal 696 pounds (24 ×29 = 696), which rounds to 695 pounds. Subtracting 695 pounds from the purchase weight (12,930 pounds) of the 24 "lightest" steers leaves 12,235 pounds for the Pittsfield weight of the 24 lightest steers in Lot Nos. 65 and 68 (12,930 −695 = 12,235). That is the exact alleged weight of the 24 steers allegedly sorted off of the mixture from Lot Nos. 68 and 65!

This means that to be consistent with respondent's worksheet and the testimony of respondent and Mrs. Manson, the 24 steers in the alleged mixture not sent to Gentry had to be the 24 lightest steers in all of Lot Nos. 65 and 68. And, as shown above, the 23 "lightest" steers in Lot No. 65 had to be included in the mixture. In other words, when the two lots allegedly became mixed, by some miraculous occurrence, out of the 64 steers in Lot No. 65, the 23 lightest steers in Lot No. 65 just happened by chance to be the ones included in the mixture. If any of the heavier steers from Lot No.

[68] Since the lightest lot in Lot No. 68 (581.7 pounds) is only 3 pounds lighter than the second heaviest lot in Lot No. 65 (584.7 pounds), it is possible that all 24 steers in the group allegedly weighed off by respondent at 12,235 pounds would have come from Lot No. 65. But for the purposes of this analysis, we will assume that only 23 head from the 24 head allegedly weighed off at 12,235 pounds came from Lot No. 65.

[69] Respondent's claimed shrink was 28 pounds in Transactions 1, 2, 9, and 11 (RX 3, 7A, 50, 61), 25 pounds in Transactions 6 and 7 (RX 35, 39A), and 24 pounds in Transaction 10 (RX 55).

65 had gotten into the mixture, the weight of the 24 steers allegedly not sent to Gentry would have been greater than 12, 235 pounds, the weight claimed by respondent for the 24 steers not sent to Gentry (JO Ref. 172, p. 147), which would have correspondingly reduced the invoice weight to Gentry (JO Ref. 173, p. 147).

It should be emphasized, again, that I am not disagreeing with respondent's position that if a mixture had occurred, as respondent claims, he would have sorted off the lightest steers, *i.e.*, those from the 64-head Lot No. 65, leaving the heavier steers from the 43-head Lot No. 68 to go to Gentry. But my point here is that the steers which happened to make their way into the alleged 67-head mixture had to include the 23 lightest steers from Lot No. 65, to be consistent with respondent's worksheet. The odds against that happening are so astronomical as to be not worth fully computing.

The odds of the first of any one of the 23 "lightest" steers in Lot No. 65 getting into the mixture would be 23 in 64; for the second (given that one of the 23 "lightest" was in the mixture), 22 in 63, etc. So the formula for computing the odds of the 23 lightest steers in Lot No. 65 getting into the mixture would be $^{23}/_{64} \times {}^{22}/_{63} \times {}^{21}/_{62}$ etc. The probability of just the last four steers (of the 23 lightest) getting into the mixture (given that the other 19 were in the mixture) would be 1 in 149,254 ($^{4}/_{45} \times {}^{3}/_{44} \times {}^{2}/_{43} \times {}^{1}/_{42} = {}^{24}/_{3,576,880} = .0000067 = 1$ in 149,254 ($1 \div .0000067 = 149,253.7$)). Adding one more steer, *i.e.*, to compute the odds as to the last five steers instead of the last four, would decrease the odds to 1 in 1,373,137. (The probability of the fifth steer would be $^{5}/_{46}$, or $^{1}/_{9.2}$ ($46 \div 5 = 9.2$); $^{1}/_{9.2} \; {}^{6}/_{149,254} = {}^{1}/_{1,373,137}$).

Although I do not give significant weight to this analysis (since the selection of the 24 "lightest" steers was made from the *average* purchase weight per head),[70] it is another circumstance that lends at least some support to my inference as to this transaction.

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[70] This is not a critical defect in the analysis since even if it is assumed that only a large number of the "lightest" 23 steers from Lot No. 65 had to "accidentally" make their way into the mixture, to be consistent with respondent's worksheet, the odds against even a large percentage of the 23 lightest steers in Lot No. 65 accidentally making their way into the alleged mixture would be *extremely* large. Similarly, even if the figure of 12,235 should have been 12,325 (see the eighth additional circumstance referred to above), that 90-pound difference would be entirely eliminated by changing the shrink to a more realistic 25 pounds per head. And even if the shrink were left at 29 pounds, and the figure of 12,325 were used for the weight of the 24 steers weighed off, that would only make a change of four or five head, *i.e.*, it would reduce thefigure of 23 to 18 or 19. The odds against 18 or 19 of the 23 lightest steers in Lot No. 65 accidentally making their way into the alleged mixture would be tremendous.

Based on the circumstances set forth above in this section, particularly Mr. McGlauchlen's affidavit, I infer that the worksheet for Transaction 5 was a complete fabrication to cover up respondent's fraudulent addition of 2% to his purchase weight of the 43 steers in Lot No. 68. The figures on the worksheet showing the alleged Pittsfield weight of 67 head mixed from Lot Nos. 68 and 65, the weight off of (24) animals weighing 12,235 pounds, and the resulting weight of 27,265 pounds are all fraudulent.

There never was a mixture of Lot Nos. 68 and 65. Lot No. 68, consisting of the 43 steers purchased at Kansas City, were "hauled . . . from the stockyards at Kansas City, Missouri, to Mr. Gentry's farm about (3) three miles outside of Hannibal, Missouri," and "[t]hese 43 steers went straight through and were not unloaded until . . . [Mr. McGlauchlen] made delivery at Mr. Gentry's farm near Hannibal, Missouri" (CX 18, pp. 2, 4). Hence the invoice weight of 27,265 pounds was arrived at by adding exactly 2% to respondent's purchase weight of 26,730 pounds. The entire worksheet was fabricated after the fact to cover up respondent's fraudulent weight padding.

Similarly, the scale ticket for Transaction 5 is a complete fraud (RX 31). The scale ticket is reproduced in § IX(C), *infra*. The scale ticket, which shows the weigher as "Saylor," shows that 21 steers and 22 steers, for a total of 43 steers, were "Sorted out #65 KC, #68 KC." The scale ticket shows two printed weights, 13,545 pounds and 13,720 pounds, which total 27,265 pounds, respondent's invoice weight to Gentry. But since the 43 steers were not sorted out of a mixture of Kansas City Lot Nos. 68 and 65, the scale ticket (as well as the worksheet) was fabricated to cover up respondent's fraud. In other words, the scale ticket was printed without any livestock being on the scale.

Since the scale ticket is serially numbered, I infer that it was fabricated on September 1, 1978, the same date as the invoice to Gentry; otherwise, the serial number would be out of sequence, which would have been readily apparent to one of complainant's investigators. I infer that the worksheet was fabricated sometime after January 29, 1979, when all of respondent's records were requested by complainant's investigators.

E. Respondent Cheated Gentry Out of $806.69 in Transaction 5. Gentry Was Satisfied with Respondent's Livestock, but Thought He Had Only Been Charged on the Basis of Respondent's Weights and Prices, Plus 25¢ Commission, Whereas, in Fact, the Weight Was Padded Exactly 2% and the Commission Charged Was $2.01 Per Cwt, Eight Times the Agreed-Upon Commission.

Mr. Gentry was one of the two customers for whom responden purchased livestock on commission. On March 26, 1979, not quite months after Transaction 5 occurred, Mr. Gentry signed an affide vit prepared by complainant's investigator, William E. Gentry (T 33) (no relation to respondent's customer), and witnessed by M Kostelecky, complainant's auditor, in which he states that respone ent turns his "purchase price and weights to me and charge[s] me commission of 25¢ per cwt and the cost of trucking from where h purchased the cattle to my feedlot" (CX 15, p. 5).

As shown in § I(E)(2), *supra*, respondent also testified that hi commission was 25¢ per cwt in the fall of 1978.

When Mr. Gentry, the customer, testified at the hearing 3 year and 3 months after the transaction, he had almost no recollectio of the transaction (Tr. 36). But, after looking over his affidavit, h testified that he signed the affidavit and that he did not wish t "make any additions or corrections or deletions to the materia that appears therein" (Tr. 34). He testified, "This seems to be es sentially what I told Mr. William Gentry" (Tr. 34).

Respondent's purchase price for the 43 steers in Lot No. 68 wa $60.44 per cwt (computed by dividing his purchase price, $16,155.9 (JO Ref. 154, p. 143), by the cwt, 267.30 (JO Ref. 152, p. 143)). Hi trucking charge was 40¢ per cwt.[71] Adding his purchase price trucking charge and 25¢ per cwt commission results in the tota price per cwt he should have charged Gentry, under their agree ment, of $61.09 ($60.44 + $.40 + $.25 = $61.09). Multiplying thi by the purchase weight of the 43 steers, 26,730 pounds, results in price he should have charged Gentry of $16,329.36 ($61.09 × 267.3 = $16,329.36). Adding respondent's $25.70 insurance charge (JO Ref. 159, p. 144) results in a total computed charge of $16,355.0 ($16,329.36 + $25.70 = $16,355.06), which is the correct invoic price to Gentry based upon their agreement. Subtracting tha figure from the actual invoice price of $17,161.75 (JO Ref. 160, p

[71] Fifty cents per cwt less 20% (CX 5, p. 9); $.50 × .8 = $.40. Complainant's tabl failed to reduce his transportation charge by 20%.

144) results in an overcharge of $806.69 ($17,161.75 −$16,355.06 = $806.69).

Respondent's overcharge of $806.69 is, of course, the amount of profit respondent made in Transaction 5 over the profit that would have been made by a legitimate order buyer charging Gentry 25¢ per cwt commission (since the overcharge was computed on the basis of purchase price, trucking cost, plus 25¢ per cwt). A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $66.83 on Transaction 5 ($.25 ×267.30 = $66.83). The computations in the preceding paragraph include that $66.83, which, added to respondent's overcharge of $806.69, results in a total profit to respondent in Transaction 5 of $873.52.

Since respondent padded the weight by 535 pounds in Transaction 5, that portion of his profit resulting from the fraudulent weight padding can be determined by multiplying the amount of padded weight by the price per cwt charged Gentry, $62.85 (JO Ref. 158, p. 144), which shows that the profit from respondent's weight padding was $336.25 (5.35 ×$62.85 = $336.25).

That portion of respondent's profit resulting from his commission overcharge can be determined by subtracting his weight padding profit from his total overcharge, which equals $470.44 ($806.69 −$336.25 = $470.44). Or it can be determined by subtracting the correct price per cwt that should have been charged, $61.09, from the price per cwt actually charged, $62.85, which equals an overcharge of $1.76 per cwt ($62.85 −$61.09 = $1.76). Multiplying the overcharge per cwt by the total pounds results in a commission overcharge of $470.45 ($1.76 ×267.30 = $470.45). (The 1¢ difference is due to rounding.)

Since respondent's commission *overcharge* was $1.76 per cwt, his total commission was $2.01 per cwt ($1.76 + $.25 = $2.01), or 8 times the agreed-upon 25¢ per cwt commission ($2.01 ÷$.25 = 8).

Transaction 5 is, therefore, an extremely flagrant violation. Respondent was an agent owing the highest degree of loyalty to his principal, Mr. Gentry. *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 102 (D. Minn. 1945) (3-judge ct). He violated his trust by cheating Mr. Gentry out of $806.69, $336.25 from adding 2% to the weight by means of his pocket calculator, and $470.44 by charging respondent more than the agreed-upon commission.

Respondent's customer, Mr. Gentry, testified that he was satisfied with the cattle that he bought from respondent (Tr. 37). However, he thought that he had only been charged upon the basis of respondent's weights and prices plus 25¢ and trucking. His affidavit states (CX 15, p. 5):

E. Respondent Cheated Gentry Out of $806.69 in Transaction 5. Gentry Was Satisfied with Respondent's Livestock, but Thought He Had Only Been Charged on the Basis of Respondent's Weights and Prices, Plus 25¢ Commission, Whereas, in Fact, the Weight Was Padded Exactly 2% and the Commission Charged Was $2.01 Per Cwt, Eight Times the Agreed-Upon Commission.

Mr. Gentry was one of the two customers for whom respondent purchased livestock on commission. On March 26, 1979, not quite 7 months after Transaction 5 occurred, Mr. Gentry signed an affidavit prepared by complainant's investigator, William E. Gentry (Tr. 33) (no relation to respondent's customer), and witnessed by Mr. Kostelecky, complainant's auditor, in which he states that respondent turns his "purchase price and weights to me and charge[s] me a commission of 25¢ per cwt and the cost of trucking from where he purchased the cattle to my feedlot" (CX 15, p. 5).

As shown in § 1(E)(2), *supra*, respondent also testified that his commission was 25¢ per cwt in the fall of 1978.

When Mr. Gentry, the customer, testified at the hearing 3 years and 3 months after the transaction, he had almost no recollection of the transaction (Tr. 36). But, after looking over his affidavit, he testified that he signed the affidavit and that he did not wish to "make any additions or corrections or deletions to the material that appears therein" (Tr. 34). He testified, "This seems to be essentially what I told Mr. William Gentry" (Tr. 34).

Respondent's purchase price for the 43 steers in Lot No. 68 was $60.44 per cwt (computed by dividing his purchase price, $16,155.92 (JO Ref. 154, p. 143), by the cwt, 267.30 (JO Ref. 152, p. 143)). His trucking charge was 40¢ per cwt.[71] Adding his purchase price, trucking charge and 25¢ per cwt commission results in the total price per cwt he should have charged Gentry, under their agreement, of $61.09 ($60.44 + $.40 + $.25 = $61.09). Multiplying this by the purchase weight of the 43 steers, 26,730 pounds, results in a price he should have charged Gentry of $16,329.36 ($61.09 × 267.30 = $16,329.36). Adding respondent's $25.70 insurance charge (JO Ref. 159, p. 144) results in a total computed charge of $16,355.06 ($16,329.36 + $25.70 = $16,355.06), which is the correct invoice price to Gentry based upon their agreement. Subtracting that figure from the actual invoice price of $17,161.75 (JO Ref. 160, p.

[71] Fifty cents per cwt less 20% (CX 5, p. 9); $.50 × .8 = $.40. Complainant's table failed to reduce his transportation charge by 20%.

144) results in an overcharge of $806.69 ($17,161.75 −$16,355.06 = $806.69).

Respondent's overcharge of $806.69 is, of course, the amount of profit respondent made in Transaction 5 over the profit that would have been made by a legitimate order buyer charging Gentry 25¢ per cwt commission (since the overcharge was computed on the basis of purchase price, trucking cost, plus 25¢ per cwt). A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $66.83 on Transaction 5 ($.25 ×267.30 = $66.83). The computations in the preceding paragraph include that $66.83, which, added to respondent's overcharge of $806.69, results in a total profit to respondent in Transaction 5 of $873.52.

Since respondent padded the weight by 535 pounds in Transaction 5, that portion of his profit resulting from the fraudulent weight padding can be determined by multiplying the amount of padded weight by the price per cwt charged Gentry, $62.85 (JO Ref. 158, p. 144), which shows that the profit from respondent's weight padding was $336.25 (5.35 ×$62.85 = $336.25).

That portion of respondent's profit resulting from his commission overcharge can be determined by subtracting his weight padding profit from his total overcharge, which equals $470.44 ($806.69 −$336.25 = $470.44). Or it can be determined by subtracting the correct price per cwt that should have been charged, $61.09, from the price per cwt actually charged, $62.85, which equals an overcharge of $1.76 per cwt ($62.85 −$61.09 = $1.76). Multiplying the overcharge per cwt by the total pounds results in a commission overcharge of $470.45 ($1.76 ×267.30 = $470.45). (The 1¢ difference is due to rounding.)

Since respondent's commission *overcharge* was $1.76 per cwt, his total commission was $2.01 per cwt ($1.76 + $.25 = $2.01), or 8 times the agreed-upon 25¢ per cwt commission ($2.01 ÷$.25 = 8).

Transaction 5 is, therefore, an extremely flagrant violation. Respondent was an agent owing the highest degree of loyalty to his principal, Mr. Gentry. *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91, 102 (D. Minn. 1945) (3-judge ct). He violated his trust by cheating Mr. Gentry out of $806.69, $336.25 from adding 2% to the weight by means of his pocket calculator, and $470.44 by charging respondent more than the agreed-upon commission.

Respondent's customer, Mr. Gentry, testified that he was satisfied with the cattle that he bought from respondent (Tr. 37). However, he thought that he had only been charged upon the basis of respondent's weights and prices plus 25¢ and trucking. His affidavit states (CX 15, p. 5):

On or about September 1, 1978, he (Saylor) purchased 43 steers for me at Kansas City. The reason I know where the cattle come from because when they come in with the cattle I call Saylor and he tells me where they came from. The weights which Saylor paid for are the weights which I paid Saylor for and the price which I paid for is the price Saylor paid for plus his 25¢ commission and the cost of trucking from Kansas City to my feed lots.

There is nothing in the record to indicate that Mr. Gentry weighed livestock at his farm. In fact, there is no indication in record that Mr. Gentry even has a livestock scale (Tr. 32–37). do not know whether Mr. Gentry would have been satisfied w the 43 steers if he had known that he was overcharged $806.69 cause of 2% weight padding and a commission of $2.01 per cwt, stead of 25¢. But even if he had still remained satisfied, know those facts, that would not reduce the sanction that would be posed upon respondent for his fraudulent weight padding, comm sion overcharging, and fabrication of documents in this transact (see § XIX, *infra*).

IV. In Transaction 6, 16 Circumstances Compel Me to Infer tl the 87 Steers Sold to Don Adams, Delavan, Wisconsin, on S temher 14, 1978, Were the Same 87 Steers Purchased by I spondent's Agent, Ed Van Ee, the Day Before in Springfie Missouri, to Which Respondent Added Exactly 2% to t Weight by Pencil, and that Respondent's Worksheet (Showi 12 Head Substituted at Pittsfield) and Scale Ticket Were Fab cated to Cover Up His Fraud.

A. On September 13, 1978, Respondent's Agent, Ed Van Ee, Purchased 87 Steers in Springfield, Missouri, Weighing 43,770 Pounds for Don Adams. Respondent Invoiced Adams the Next Day for 87 Steers Weighing Exactly 2% More, *i.e.*, 44,645 Pounds. Respondent's Agent, Ed Van Ee, Also Purchased 67 Steers Weighing 42,150 Pounds on the Same Date (September 13, 1978) at the Same Place for Carroll Long, Which Respondent Sold to Long in Transaction 2 at an Increase in Weight of Exactly 2% (Allegedly Caused by Substituting 13 Head at Pittsfield). Respondent's Agent, Ed Van Ee, Purchased a Third Lot at the Same Time, with Unknown Results. Two Increases of Exactly 2% from the Same Purchase of Three Lots Would Occur, by Chance, 1 Time in 41,152.

Respondent's purchase invoice for livestock purchased at Springfield, Missouri, by Ed Van Ee is reproduced on the next page (RX 5). Respondent's carbon copy of his invoice to Don Adams, Delavan, Wisconsin, dated September 14, 1978, is reproduced on the following page (CX 6, p. 1; identical to RX 36), and respondent's carbon copy of his invoice to Carroll Long, Pleasant Hill, Illinois, dated September 15, 1978, is reproduced on the third page following this (RX 8).

Respondent's Purchase Invoice For Transactions 2 and 6 (RX 5)

Ozark Commission Co.
Union Stock Yards

Springfield, Mo., 175 → Tom Edwards Co

Sold to 177 → George Saylor

Cattle	Calves	Hogs	Sheep	Weight	Dock	Price	Amount
		178 → Geo Long					
67	No 11 Cattle			42150		181 →	27,10
			180 →		Com	182 →	105
						$	
						183 →	27,20
			Venable				
62	No 14+12			44815			27568
			185 →		Com		112
						$	27,68
		186 → Adams Delivery Ohio					
87	No 15 Cattle			43770		189 →	30,106
			188 →			190 →	109
						$	30,215
						191 →	
Respondent's Exhibit #5				Total		$	85,102.61

Fol. L # 5060

Transaction 6 Invoice Copied From Respondent's Records (CX 6, p. 1)

GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 286-6186
(217) 285-4011

192 DATE Sept 14 19 28

SOLD TO Wm Adams
Pecan, Wisconsin

NO.	KIND	WEIGHT	PRICE	AMOUNT	
87	Steers (Spring)	44645	7148	31912	25
83	Wt 513# 194	195	Cwt	47	82
		196			
		197		31960	12
	Paid Price				
		Bill # 5056			
	Truck - Bennett				

#2785 198

Signed

30 315.24 WE APPRECIATE YOUR PATRONAGE

Transaction 2 Invoice Copied From Respondent's Records (RX 8)

GEORGE L. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

199

DATE 1 16 19

SOLD TO

No.	KIND	WEIGHT	PRICE	AMOUNT
67	Spring	42995	66.5	28,440.80
200		201	202	
		203		42.00
		204		28,440.80

Respondent's Exhibit #8

RLO #5053

#2788 205

27,806.21

Signed

WE APPRECIATE YOUR PATRONAGE

The livestock purchased for Mr. Adams in Transaction 6 (JO Ref. 186, p. 188) and Mr. Long in Transaction 2 (JO Ref. 178, p. 188) was purchased at Springfield, Missouri, by Mr. Ed Van Ee (JO Ref. 175, p. 188), at respondent's request (JO Ref. 177, p. 188; Tr. 316-17). Respondent testified that Ed Van Ee buys livestock for him at Springfield, Missouri, when respondent is not there, and that Ed Van Ee uses an Ozark Commission Company Invoice (JO Ref. 176, p. 188) as the sheet of paper on which he invoices respondent. Respondent testified as to Transaction 2 (Tr. 316-17):

> A. O.K., if I am reading this right, it looks like these cattle that we used to make up the bulk of that load came from Springfield, Missouri, through Ed Banee [Van Ee], who is an order buyer, that when I'm not there, he does my work for me.
>
> Now, I think this might be a little misleading. To get the bills to me he borrows one of these slips off the Ozark Commission Company which, to me, means nothing other than I happen to know what it is, and makes out the bill for me so he can get—he lives at Pella, Iowa, this gentleman does, so he puts my information on an Ozark Commission Company—I don't know whether this is a check-in slip or what it is, but this happens all the time. He just grabs a sheet of paper so he can get it on the truck that [sentence not completed by reporter].
>
> And it looks like, according to this, we worked Mr. Long's cattle out of Buyer No. 11, which would be, through the Springfield yards, would be charged Green-11. Now, I can't explain the Green, but that's the way they charge the cattle, or that's the way we got started, so, what that means is anybody's guess.

Mrs. Manson was not aware of the fact that the livestock was not purchased through the Ozark Commission Company, but she explained that "Green," which appears on the Springfield purchase invoices dated September 13, 1978, for the Transaction 2 and Transaction 6 livestock (CX 2, pp. 6-8; CX 6, pp 6-8) is the buyer number used by Ed Van Ee. She testified (Tr. 144):

> A. Exhibit 5 is the purchase sheet of cattle that was purchased through the Ozark Commission Company.
>
> Q. Where is the Ozark Commission Company?
>
> A. Springfield, Missouri.

Q. Who is the commission man that represented M Saylor down there?

A. Ed Vanee.

Q. You will notice on some other exhibits there is Ben Green [Van Ee-Green; CX 6, p. 8].

Would you tell us what that word, "green" meant o those exhibits?

A. Yes, "green" is a buyer number.

Q. In other words, instead of one, two, three, four, the have green, red, orange, yellow and——

A. They have Green No. 11, Green No. 12 or whatever. That is a buying number. That is not——

Q. I see. So a Mr. Green was never connected with these cattle?

A. No. There is no Mr. Green.

The invoice to respondent (JO Ref. 177, p. 188) from Ed Van (JO Ref. 175, p. 188) is not dated, but other documentary evid shows that Ed Van Ee bought the livestock on September 1978.[72] Mr. Van Ee charged respondent 25¢ per cwt commis (JO Ref. 190, p. 188; see note 72).

The 87 steers (JO Ref. 187, p. 188) purchased by Ed Van Ee September 13, 1978, at respondent's request for Adams (JO R 186, p. 188) at Springfield, Missouri, weighed 43,770 pounds (Ref. 188, p. 188). On September 14, 1978 (JO Ref. 192, p. 189), t day after Van Ee purchased the 87 steers, respondent sold 87 ste (JO Ref. 193, p. 189) in Transaction 6 to Don Adams, Delavan, W consin, invoiced at 44,645 pounds (JO Ref. 194, p. 189), *i.e.*, 8 pounds more than respondent's purchase weight (44,645 — 43,770

[72] For example, in Transaction 6, we know that the 87 steers purchased "Green 15" or "Green 15, Ed Van Ee" on September 13, 1978, at Springfield, M souri (CX 6, pp. 6-8), are the same 87 steers sold by Ed Van Ee to respondent b cause the steers sold to "Green 15" or "Green 15, Ed Van Ee" were purchased three lots, 31, 30, and 26, totalling 87; their weights of 15,610 pounds, 16,040 pound and 12,120 pounds total 43,770 pounds, the weight sold by Ed Van Ee to respondent (JO Ref. 188, p. 188), and the three lots purchased by "Green 15" or "Green 15, E Van Ee" cost $10,509.31, $11,228, and $8,369.01, which total $30,106.32, the exact price shown on the sale from Ed Van Ee to respondent (JO Ref. 189, p. 188). Ed Van Ee then added a commission of $109.42 (JO Ref. 190, p. 188), which is 25¢ per cwt ($.25 × 437.70 = $109.42). A similar analysis shows that the 67 steers purchased for Mr. Long (JO Ref. 178, p. 188) in Transaction 2 were purchased by Ed Van Ee in Springfield on September 13, 1978 (CX 2, pp. 6-8), at 25¢ per cwt commission.

875). That is exactly 2% more than respondent's purchase weight of the 87 steers the day before. That is, a person using a calculator to add exactly 2% to the purchase weight would read 875.4 on the calculator (.02 ×43,770 = 875.4), which rounds to 875.[73]

On September 15, 1978 (JO Ref. 199, p. 190), 2 days after Van Ee purchased 67 steers (JO Ref. 179, p. 188) at respondent's request for "Mr. Long" (JO Ref. 178, p. 188) at Springfield, Missouri, weighing 42,150 pounds (JO Ref. 180, p. 188), respondent sold 67 steers (JO Ref. 200, p. 190) in Transaction 2 to Carroll Long, Pleasant Hill, Illinois, invoiced at 42,995 pounds (JO Ref. 201, p. 190), *i.e.*, 845 pounds more than respondent's purchase weight (42,995 −42,150 = 845). That is exactly 2% more than respondent's purchase weight of the 67 steers 2 days before. That is, a person using a calculator to add exactly 2% to the purchase weight would read 843 on the calculator (.02 ×42,150 = 843), which rounds to 845.[74]

As shown in § I(D)(4), *supra*, the odds of increases of exactly 2% over the purchase weight resulting from sorting would have been 1 in 339 in Transaction 2 and 1 in 351 in Transaction 6. If there were not a third transaction involved in the same purchase by Ed Van Ee on September 13, 1978, it would be quite simple to compute the odds that both purchases by Ed Van Ee for respondent would gain exactly 2% as a result of respondent's sorting and substituting (respondent claims he substituted 12 head in Transaction 6 and 13 head in Transaction 2). The odds would be 1 in 118,989 ($1/339 \times 1/351 = 1/118{,}989$). The formula for computing these odds is set forth in § I(G), *supra*.

Similarly, it would be quite easy to compute the odds of 2% increases occurring in the two transactions involving Ed Van Ee's purchase on September 13, 1978, for respondent, and the nonoccurence of a 2% increase in the third transaction. The third transaction involved 62 head weighing 44,815 pounds (JO Ref. 184, 185, p. 188). (The record is silent as to whether there was any increase when respondent sold this lot to his customer, Mr. Venable.) A 2% increase in that transaction would have been an increase of 895 pounds (.02 ×44,815 = 896.3, which rounds to 895). The odds of an increase of exactly 2% in that transaction would be 1 in 359 (895 ×2 ÷5 + 1 = 359) (see § I(D)(4), *supra*). Since there is 1 chance in 359 that a 2% increase would occur in that lot, there are 358

[73] For a discussion as to why respondent rounded his calculated increases of exactly 2% or exactly 3% to the nearest 5 pounds, see § I(A), *supra*.

[74] For a discussion as to why respondent rounded his calculated increases of exactly 2% or exactly 3% to the nearest 5 pounds, see § I(A), *supra*.

chances out of 359 that a 2% increase would not occur in t transaction.

The formula for computing the statistical odds of an occurre of a 2% increase in Transactions 2 (Long) and 6 (Adams) and a n occurrence of a 2% increase in the third transaction (Venable $\frac{1}{339} \times \frac{1}{351} \times \frac{358}{359} = \frac{358}{42,717,051} = .0000083$. That would equ chance in 120,482 (1 ÷.0000083 = 120,481.9).

The odds against the occurrence of the three events just c cussed are slightly greater than when just two transactions w involved (*i.e.*, 1 in 118,989) since we are not only determining t probability that the two transactions will have a 2% increase b also, that the third transaction will not have a 2% increase.

Accordingly, it is easy to see that instead of using the form for determining the occurrence of exact 2% increases in Trans tions 2 and 6 and the nonoccurrence of a 2% increase in the thi transaction, the proper formula is the one for determining the st tistical odds of two or more of the three transactions having an i crease of exactly 2%.

Before computing that probability, it is important to point o that respondent's "rounding" to the nearest 5 pounds does n affect the statistical probability determinations one iota. That is, t eliminate any "rounding" issue, we would merely define the prob lem with greater precision. Specifically, we would define the prob lem as follows: "In the three transactions involving Van Ee's pur chases for respondent on September 13, 1978, at Springfield, Mis souri, if respondent sorted and substituted animals in each transac tion, what are the odds that two or more of the transactions would have weight increases which would exactly equal the figure deter mined by increasing the purchase weight by .02 times the purchase weight, rounded to the nearest 5 pounds?" (Anyone insisting on ab solute precision can read that into my short-handed expressions of "2% weight increases.")

The formula for computing the probability of two or more of the three transactions involving Van Ee's purchases having 2% weight increases is set forth in Freund, *Modern Elementary Statistics* 97-98 (3d ed. 1967) (Lib. of Cong. Catalog Card No. 66-29560), as follows: [75]

[75] Since the examples in the text are quite simple and clear, it is not necessary to understand the formula. For those who do not understand the formula, and wish to do so, see Freund, *supra*, at 83-97. All the formula is saying is that when you want to determine the probability that one event *or* another event will happen, where both events are independent of each other, *i.e.*, mutually exclusive, you add their individual probabilities (see note 45, *supra*, p. 100). As shown in § I(G), *supra*, if you

Continued

*POSTULATE 3: If A and B are mutually exclusive events, then the probability of $A \cup B$ equals the sum of the individual probabilities of events A and B.**

* As formulated here, the postulates of probability apply only when the sample space S is *finite*. When the sample space is *countably infinite*, (namely, when there are as many outcomes as there are whole numbers), the third postulate will have to be modified so that for any sequence of mutually exclusive events $A_1, A_2, A_3, \ldots,$

$$P(A_1 \cup A_2 \cup A_3 \cup \ldots) = P(A_1) + P(A_2) + P(A_3) + \ldots$$

Thus, if the probability that a football team will win a certain game is 0.68 and the probability that it will tie is 0.05, then the probability that it will win or tie *must* be $0.68 + 0.05 = 0.73$; if the probability that a person who applies for a job was born in the State of New York is 0.22 and the probability that he was born in Pennsylvania is 0.13, then the probability that he was born in either state *must* equal $0.22 + 0.13 = 0.35$.

Here, there are only four possible combinations (events) involving two or more increases of 2% in Van Ee's purchases. Van Ee purchased livestock at respondent's request for Long, Adams and Venable. The four combinations of events are (a) Long and Adams increased 2%, Venable did not; (b) Long and Venable increased 2%, Adams did not; (c) Adams and Venable increased 2%, Long did not; and (d) Long, Adams, and Venable all increased 2%. The individual probabilities for Long, Adams, and Venable are set forth above in this section. The sum of the individual probabilities of the four possible events is .0000243, or 1 in 41,152 ($1 \div .0000243 = 41{,}152$), determined as follows: [76]

---

want to determine the probability that one independent event *and* another independent event both will happen you multiply their individual probabilities. These formulas and calculations are neither difficult nor complex. Anyone who has had high school arithmetic should be able to understand and use them. And with a pocket calculator, you don't even need to use high school arithmetic. Hence respondent can have no legitimate objection to the statistical calculations set forth in this decision.

[76] The probability of two or more of Van Ee's three purchases having 2% weight increases from substituting animals can also be determined by using the binomial probability distribution formula (see § I(D)(4), *supra*).

Individual Probabilities

	Event	Mr. Long	Mr. Adams	Mr. Venable		
(a)		$1/339 \times$	$1/351 \times$	$358/359 =$	$358/42{,}717{,}051 =$	.0000083
(b)		$1/339 \times$	$350/351 \times$	$1/359 =$	$350/42{,}717{,}051 =$	.0000081
(c)		$338/339 \times$	$1/351 \times$	$1/359 =$	$338/42{,}717{,}051 =$	.0000079
(d)		$1/339 \times$	$1/351 \times$	$1/359 =$	$1/42{,}717{,}051 =$	.0000000
	Total					.0000243

To put these figures into perspective, respondent engaged in about 300 transactions during the period involved here (§ I(D)(4), *supra*), which was a little less than 4 months. At that rate, he would engage in about 1,000 transactions a year. So we could expect that when respondent purchased three lots at a particular time to fill orders for customers (or had them purchased by an agent—it makes no difference), and sorted and substituted animals, at least two of the lots would gain exactly 2%, by chance, about once every 41 years.

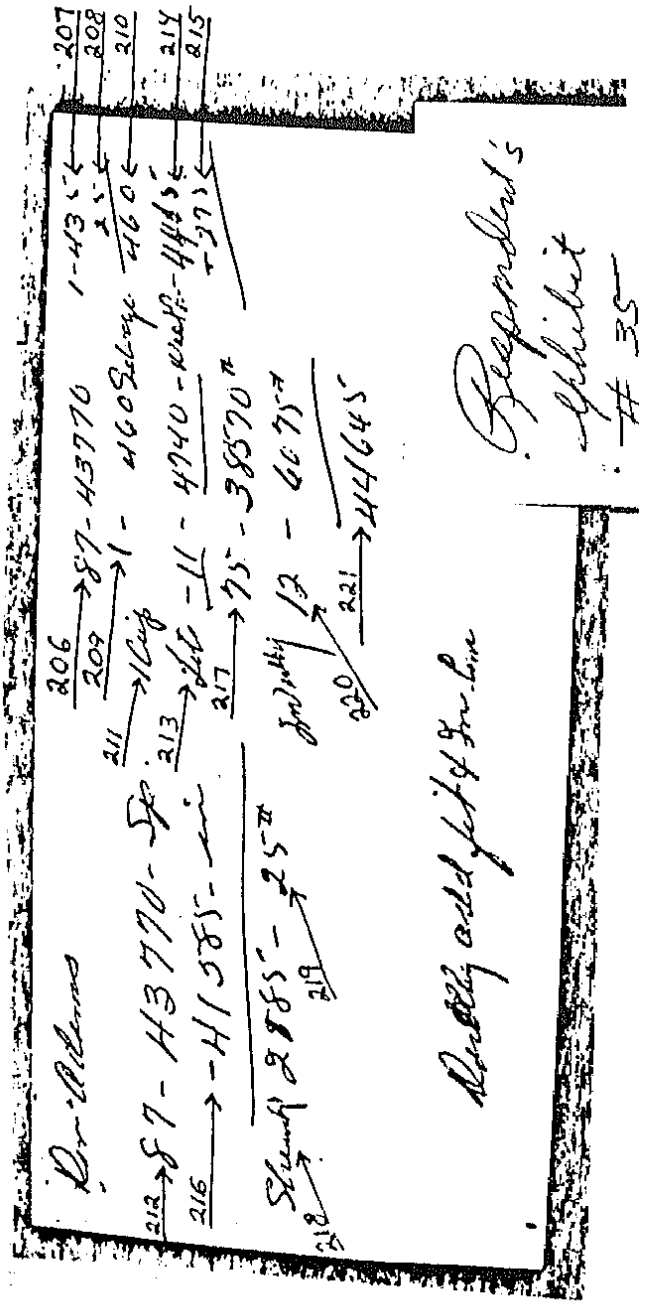
I am not willing to infer that the Adams and Long transactions were the one time in 41 years that this happened by chance. Rather I infer from those remote odds that the 2% increases occurred because respondent used his pocket calculator to add 2% of the Adams and Long purchases. In other words, the invoices from Van Ee to respondent (RX 5) and from respondent to Adams (CX 6, p. 1) and Long (RX 8), containing increases of exactly 2%, are "smoking guns," which, standing alone, would be enough to lead me to infer that respondent added weight by pencil in the Adams and Long transactions, *i.e.*, Transactions 6 and 2.[77]

B. Respondent's Transaction 6 Worksheet Shows the Pittsfield Arrival Weight of 87 Head, Shrink Computed at 25 Pounds Per Head, the Weight of 12 Head Removed (Increased by 300 Pounds of Prorated Shrink, *i.e.*, 25 Pounds Per Head), the Weight of 12 Head Substituted from Inventory, and the Resulting Invoice Weight of 44,645 Pounds. Respondent's Scale Ticket Shows the Same Total Weight, 44,645 Pounds, but with 400 Pounds of "Pro Rate" on "16 hd."

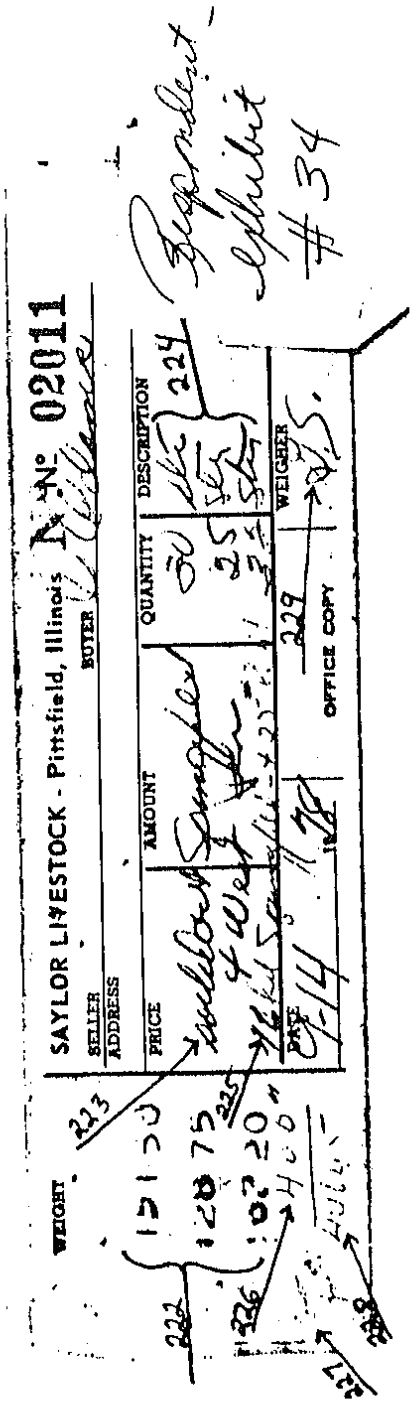
Respondent's worksheet (RX 35) and scale ticket (RX 34) for Transaction 6 are set forth on the next page. The cover sheet to the exhibits introduced by respondent for Transaction 6 is set forth on the following page.

[77] Even if we were to calculate the sum of the four individual probabilities by reducing each individual probability by half, *i.e.*, if we were to assume for some illogical reason that whenever respondent sorted animals and made substitutions, there could only be a gain, never a loss in weight, the odds against two or more increases of exactly 2% would be 1 in 10,309. (The individual probabilities would be: Long $1/170$, Adams $1/176$, and Venable $1/180$. The events would equal: (a) .0000332, (b) .0000324, (c) .0000313, (d) .0000001, for a total of .0000970. 1 ÷.0000970 = 10,309.)

Respondent's Transaction 6 Worksheet (RX 35)



Respondent's Transaction 6 Scale Ticket (RX 34)



OZARK COMMISSION CO.

230 September 10, 1978

231 87 head weight 43770
233 62 head weight 44815
236 67 head weight 42150

232 at Pittsfield
234 Segregate out 87 head 235 weight 43770 Sold 87 head
237 Remove 1 cripple weight (460) to Adams
238 Remove 11 light steers weight (4740) weight 44645
239 Replace with 12 steers weight 6075

240 87 head 241 scale weight 44645

See exhibit #5 Purchase Invoice
exhibit #34 scale ticket
exhibit #35 worksheet
exhibit #36 billing
witnesses: George Saylor
Dorothy Manson

RE #34-36
1/31/81

Respondent's scale ticket shows three printed weights (JO Ref. 222, p. 199) plus a pencil addition of 400 pounds (JO Ref. 226, p. 199) "Pro Rate" (JO Ref. 227, p. 199), totalling 44,645 pounds (JO Ref. 228, p. 199), the invoice weight to Adams (JO Ref. 194, p. 189). The scale ticket also has the notation "sorted out Springfield & West Pen" (JO Ref. 223, p. 199), and, opposite "400#," the notation "16 hd Springfield—+ 25# Per Hd" (JO Ref. 225, p. 199). The weigher is shown as "G.S." (JO Ref. 229, p. 199), *i.e.*, George Saylor.

Before beginning a tedious mathematical discussion, I should state at the outset that this subsection demonstrates that if respondent had substituted one crippled steer and 11 light steers, and replaced them with 12 steers from respondent's inventory, as alleged, the computations on respondent's worksheet are exactly correct, *i.e.*, the weight shown on the worksheet resulting from the substitution, 44,645 pounds (JO Ref. 221, p. 199), is precisely correct.

It is important that the court understand the mathematics of this worksheet because when Mrs. Manson was cross-examined as to why there was 400 pounds of prorated shrink on the scale ticket, she could give no explanation. Respondent's ready explanation, which is shown to be perjury (§ IV(C), *infra*), was that a mistake was made, and that Adams should have been invoiced for an additional "2,100" pounds, "or something like that" (Tr. 328).

As shown below in this subsection, there is no mathematical error on respondent's worksheet. (His error was in fabricating a worksheet and a scale ticket with a fatal discrepancy, and then attempting to explain away the fatal variance by perjury.)

The easiest (but not the best) method of demonstrating that there is no error in the computation of the 44,645-pound invoice weight computed on the worksheet (assuming for this discussion that the 12 steers were substituted, as alleged) is to check the arithmetic on respondent's cover sheet to his Transaction 6 exhibits. The cover sheet shows that respondent made three purchases from Ozark Commission Company on the same date,[78] consisting of 87 head weighing 43,770 pounds (JO Ref. 231, p. 200), 62 head and 67 head (JO Ref. 233, 236, p. 200). The purchases of 62 head and 67 head at the same time are not relevant to Transaction 6, except that 2% weight increases in the 67 head purchase (for Transaction 2) and

[78] The date of September 10, 1978 (JO Ref. 230, p. 200), is erroneous since, as shown in § IV(A), *supra*, Ed Van Ee made this purchase for respondent on September 13, 1978. Ozark Commission Co. is also erroneous since respondent testified that Van Ee merely uses Ozark's invoice forms for convenience (Tr. 316), an illegality that we are not concerned about in this case.

the 87 head purchase (for Transaction 6) would occur, by c only 1 time in 41,152 (see § IV(A), *supra*).

Respondent's cover sheet shows that from the 87 head, had a purchase weight of 43,770 pounds,[79] respondent rem cripple weighing 460 pounds (JO Ref. 237, p. 200), and 1 steers weighing 4,740 pounds (JO Ref. 238, p. 200). The cover then shows that respondent replaced the 12 steers removed w steers weighing 6,075 pounds (JO Ref. 239, p. 200), resultin scale weight of 44,645 pounds (JO Ref. 241, p. 200) for the 87 (JO Ref. 240, p. 200) sent to Don Adams.

It is quite easy to determine from a pocket calculator th arithmetic on the cover sheet is correct (43,770 −460 −4,7 6,075 = 44,645). An examination of respondent's worksheet s that it is entirely consistent with the cover sheet, just disc and, in addition, it shows the computation resulting in 25 p per head shrink, which respondent included in the weight of t animals allegedly removed (for a total of 300 pounds of pro shrink).

First, as to the shrink computation (at the left-hand side o spondent's worksheet), the worksheet shows the purchase weig the 87 head, 43,770 pounds (JO Ref. 212, p. 199). From this spondent subtracted 41,585 pounds, the alleged "in" weight, o rival weight, in Pittsfield of the 87 head (JO Ref. 216, p. 199). resulted in a total shrink of 2,185 pounds (JO Ref. 218, p. which, divided by the 87 head, equals 25 pounds per head sh (JO Ref. 219, p. 199) (2,185 ÷87 = 25.1, which rounds to 25).

At the top of the middle portion of the worksheet, respon again shows the purchase weight of the 87 head, 43,770 pounds Ref. 206, p. 199). He then shows that 1 "Crip" (JO Ref. 211, p. was subtracted weighing 460 pounds (JO Ref. 209, p. 199). The culations for the 460-pound "Crip" are shown in the top right-h corner of the worksheet. The alleged Pittsfield weight of the c pied steer, 435 pounds (JO Ref. 207, p. 199), was increased by pounds (prorated shrink) (JO Ref. 208, p. 199), resulting in a c puted weight of 460 pounds (JO Ref. 210, p. 199), which was

[79] The cover sheet is slightly ambiguous since the words "at Pittsfield" (JO 202, p. 200) could be interpreted to apply to the "weight 43770" (JO Ref. 235, p. of the 87 head segregated out of the three lots (JO Ref. 234, p. 200). However, w the "weight 43770" (JO Ref. 235, p. 200) is read in conjunction with the purch weights of the three lots shown on the cover sheet (JO Ref. 231, 233, 236, p. 2 weeks of which, including the 43,770 pounds for the 87 head, is identical to the p those weights shown on Van Ee's invoice to respondent (JO Ref. 180, 185, 188, 202, it is obvious that the cover sheet is merely showing the purchase weight of s [illegible] (JO Ref. [illegible]) [illegible] er than the Pittsfield weight of the 87 head.

weight respondent subtracted from the purchase weight (JO Ref. 209, p. 199).

Respondent then subtracted 11 "Lite" weighing 4,740 pounds (JO Ref. 213, p. 199). The computation for the weight of the 11 light steers is shown on the right-hand side of the worksheet. The alleged Pittsfield weight of the 11 light steers, 4,465 pounds (JO Ref. 214, p. 199), was increased by their prorated shrink of 25 pounds per head, *i.e.*, by 275 pounds (JO Ref. 215, p. 199) (11 $\times$25 = 275). Although the worksheet does not show the result of the addition of 4,465 pounds plus 275 pounds, which equals 4,740 pounds, 4,740 pounds was subtracted from the purchase weight of the 87 head (JO Ref. 206, p. 199), as the weight of the 11 "Lite" removed (JO Ref. 213, p. 199).

Subtracting the computed weight (including 25 pounds per head prorated shrink) of the 1 cripple and 11 light steers from the purchase weight of 43,770 pounds results in a computed weight of 38,570 pounds (43,770 $-$460 $-$4,740 = 38,570) for the 75 steers allegedly used from the 87 head purchased (JO Ref. 217, p. 199). Adding the Pittsfield weight of the 12 steers allegedly substituted from respondent's inventory, 6,075 pounds (JO Ref. 220, p. 199), results in a total weight of 44,645 pounds (JO Ref. 221, p. 199) (38,570 + 6,075 = 44,645).

Hence an analysis of respondent's worksheet proves conclusively that there was no mathematical error in computing the invoice weight of 44,645 pounds, assuming that respondent removed 12 steers, and substituted 12 from inventory, as alleged. The invoice weight of 44,645 pounds is exactly correct (assuming, erroneously, the truth of respondent's fable as to the 12 head substituted). Moreover, the invoice weight of 44,645 pounds is based on the removal of 12 steers—not 16—with their 300 pounds—not 400 pounds—of prorated shrink involved in calculating the 44,645 weight figure.

Mrs. Manson's testimony on direct examination explaining the Transaction 6 worksheet is entirely consistent with the worksheet. She testified (Tr. 156-57):

> Q. Now, would you examine Respondent's Exhibit 35, please, and go through that for us?
>
> A. That is a worksheet for Don Adams. There was eighty-seven steers, weighing 43,070 [43,770] at Springfield. They weighed in at Pittsfield at 41,585, having a transit shrink of 2,185, which would make for 25 pounds per head shrink. Out of those eighty-seven head, there was a crippled one that was taken off, averaged at 460. There was eleven light-head taken off at 4,740, which left seventy-five

head, weighing 38,570, and out of inventory twelve head were added that weighed 6,075, making a total weight of 44,645.

On her initial cross-examination as to Transaction 6, M Manson again stated that the worksheet shows 12 head taken and 12 head added from inventory. She testified (Tr. 210):

Q. I understand this work sheet to show that 12 head were taken off the load of 87 that came in from Springfield and were replaced by 12 head from inventory?

A. Yes.

It does not take a Math Major to discern the fatal variance tween respondent's worksheet and scale ticket for Transaction 6. I were to read the scale ticket without reference to any other fac I would interpret the scale ticket to mean that 16 of the 87 stee (30 + 25 + 32 = 87; JO Ref. 224, p. 199) shown on the scale tick came from Springfield and the others came from respondent's i ventory, West Pen (JO Ref. 223, 225, p. 199), and that 400 pounds prorate (JO Ref. 225, 226, 227, p. 199) was added to the actu weight of the 87 steers weighed at Pittsfield, 44,245 pounds (15,1 + 12,875 + 16,220 = 44,245 (JO Ref. 222, p. 199), because the head from Springfield had a transit shrink of 25 pounds per hea (16 ×25 = 400) (JO Ref. 225, 226, 227, p. 199).

However, when I read the scale ticket together with the worl sheet, I cannot conceive of any possible explanation for the 40 pound prorate figure shown on the scale ticket. According to th worksheet, the 44,645-pound invoice weight was based on calcul tions involving 300 pounds of prorated shrink, 25 pounds because c one crippled animal (JO Ref. 208, p. 199), and 275 pounds becaus of 11 light animals (JO Ref. 215, p. 199). That totals 300 pound *i.e.*, 25 pounds per head on 12 animals. There is no possible legiti mate explanation as to why the worksheet weight figure of 44,64 pounds is based on calculations involving 300 pounds of prorate shrink on 12 steers and the scale ticket weight figure of 44,64 pounds includes 400 pounds of prorated shrink on 16 steers.[80]

[80] The only way I can imagine that it actually happened is that when respondent was fabricating the worksheet, he looked at the scale ticket to see what story had to be told on the worksheet and then got distracted midway through the fabrication. When he resumed, he mistakenly thought that he was dummying up a story involving 12 head at 25 pounds per head rather than 16 head at 25 pounds per head. He would have argued that he was showing the shrink on the animals removed. An examination of the other scale tickets and worksheets shows that it was not his practice to honestly reveal how much shrink was in each load, according to his fab-

Continued

Furthermore, either figure, 300 pounds or 400 pounds, was completely false and deceptive as to the total amount of shrink included in the 87 head, assuming that 12 head had been removed and substituted, as alleged.

The actual Pittsfield weight of the 87 steers sold to Adams in Transaction 6 (according to respondent's "substitution fable") was only 42,760 pounds, and the true prorated shrink was 1,885 pounds. This is computed as follows from respondent's worksheet.

Actual Shrink in Transaction 6 According to Respondent's Worksheet

Pounds	
41,585	Actual Pittsfield weight of 87 head (JO Ref. 216, p. 199)
−435	Actual Pittsfield weight of 1 "Crip" removed (JO Ref. 207, p. 199)
−4,465	Actual Pittsfield weight of 11 "Lite" removed (JO Ref. 214, p. 199)
36,685	Actual Pittsfield weight of 75 head remaining
+6,075	Actual Pittsfield weight of 12 head added (JO Ref. 220, p. 199)
42,760	Actual Pittsfield weight of reconstituted load
44,645	Weight shown on scale ticket (JO Ref. 228, p. 199)
−42,760	Actual Pittsfield weight of reconstituted load
1,885	Amount of prorated "shrink" included in scale ticket

The total shrink included in the scale ticket could, of course, be arrived at more simply by multiplying 75 head (JO Ref. 217, p. 199), the number allegedly used from the original 87 head, by 25 pounds per head shrink (JO Ref. 219, p. 199) (75 ×25 = 1,875).[81]

ricated stories. For example, in the "companion" Transaction 2, discussed next, involving the same purchase by Van Ee for respondent as in Transaction 6, in which respondent's worksheet is identical to his Transaction 6 worksheet involved here, except that respondent allegedly removed 13 head in Transaction 2 and 12 head in Transaction 6, respondent's Transaction 2 scale ticket shows no shrink! The Transaction 2 scale ticket, fabricated on the day after the scale ticket involved here, merely shows three printed weights totalling the invoice weight.

[81] The 10-pound difference between 1,885 and 1,875 is due to "rounding." If we multiply 75 head by 25.1, the actual shrink computed from the worksheet (2,185 ÷87 = 25.1) (JO Ref. 212, 218, p. 199), the result is 1,882.5 (which rounds to 1,885), a difference of only 2.5 pounds from the 1,885 pounds determined in the table above. Since respondent's livestock scale weighs only to the nearest 5 pounds, there will always be a slight discrepancy if two different methods are used.

Accordingly, assuming that respondent substituted 12 head, as alleged, if respondent had wanted to be honest and show the total amount of shrink included in the 87 head, his three printed weights would have totalled 42,760 pounds, the actual weight of the reconstituted load (according to respondent's worksheet), and the pencil figure would have been 1,885 pounds. The pencil notation would have shown "75 hd Springfield—+ 25.1# Per Hd."

To summarize, irrespective of whether the scale ticket showed 300 pounds of shrink on 12 head or 400 pounds of shrink on 16 head, either figure would have been false and deceptive since there was actually 1,885 pounds of prorated shrink on 75 head, according to respondent's worksheet. But the two main points of this subsection are (i) there is a fatal variance between the worksheet's calculations involving 300 pounds of prorated shrink on 12 head and the scale ticket's 400 pounds of prorated shrink on 16 head, and (ii) if respondent wanted to show correctly (according to his worksheet) that there was 1,885 pounds of prorated shrink on 75 head, the printed weight figures would have to be reduced to 42,760 pounds, so that the total weight would be 44,645 pounds, the correct invoice weight (according to respondent's worksheet).

C. Mrs. Manson Could Not Explain Why There Was Only 400 Pounds of Prorated Shrink on 16 Head on the Scale Ticket. Respondent's Explanation Was Perjured Nonsense.

On the morning of the final day of the hearing, December 1981, Mrs. Manson was cross-examined as to why the scale ticket showed only 400 pounds of prorated shrink on 16 head, instead of the pro rata shrink on all of the cattle in the lot. She was unable to offer any explanation. She testified (Tr. 256–59):

> Q. Mrs. Manson, would you look, please, at Respondent's Exhibit 35 [worksheet]. Let me see if I understand what this tells us properly here. There were 87 head of cattle purchased in Springfield at 43,770 pounds, and when they arrived in Pittsfield, they weighed 41,585 pounds, is that right?
>
> A. Yes.
>
> Q. But we don't have any scale ticket for that in-weight, do we?
>
> A. No.

Q. And, the shrink on the trip was 2,185, or 25 pounds a head. Then the cattle were sorted and one cripple was taken off and it weighed, in Springfield, 435 pounds, right? Oh, I'm sorry, I beg your pardon, in Pittsfield it weighed 435 pounds?

A. Yes.

Q. But we don't have a scale ticket for that?

A. No.

Q. Then, there were 11 light head that were taken off, and they weighed 4,465 pounds in Pittsfield?

A. Mine isn't very visible, but I would say that is what it is.

Q. But we don't have a scale ticket for that, right?

A. No.

Q. Then, we had 12 head added back in, and they weighed 6,075 pounds, right?

A. Yes.

Q. But we don't have a scale ticket for that, right?

A. No.

Q. Now, would you look at Exhibit 34, please, and again, I need some help with reading my copy of the scale ticket, in the far left-hand, bottom left-hand corner of the scale ticket, it is very faint; does that say, pro-rate?

A. That would be the shrink.

Q. Now, we have pro-rate of 400 pounds, and to the right of that, 16 head, Springfield, 25 pounds per head, is that what that reads to you?

A. Yes.

Q. Then, that seems to show us that there is a pro-rata shrink on only 16 head out of the total, is that correct?

A. I didn't weigh these. I would have no idea.

Q. Would you agree with me that, based on what is before us, I have come to a fair conclusion?

A. Well, sir, I did not weigh them. I wouldn't——

Q. (Interrupting) If my conclusion is accurate, that is, for a pro-rata shrink of 400 pounds on only 16 out of the total was taken, would you have any idea why we do not have a pro-rata shrink on all of the cattle in that lot?

A. No, I wouldn't, because I did not weigh them. I do my work off information given to me. I am in another office and I don't handle the weighing of the cattle unless there is an emergency and I have to go out there. So, I could not answer you this question.

Judge WEBER: If I understand the questions correctly, they are not directed to you as the weigher of the cattle, they are directed to you for a reasonable explanation of these figures that are provided to you and that you work from. If his conclusion is unreasonable or inaccurate, you should tell him why the conclusion is unreasonable or inaccurate, not respond by who weighed them. If there is another explanation that he hasn't taken into consideration, then, that would be appropriate to give him the other explanation. Do you understand?

The WITNESS: The only explanation I could give him is, I go by what is off this work sheet that is given to me.

Mrs. Manson was not asked to explain the variance between the worksheet's calculations involving 300 pounds of shrink on 12 head and the scale ticket's 400 pounds of shrink on 16 head, but only for her explanation as to why the scale ticket showed shrink on 16 head. As shown above, she could offer no explanation.

Following Mrs. Manson's cross-examination as to the 400-pound shrink figure on the scale ticket, Mrs. Manson was asked no further questions as to this scale ticket. Later in the morning, the hearing's morning recess was taken until 10:30 a.m. (Tr. 274), and at 11:32 a.m., the hearing was adjourned for lunch until 12:30 p.m. (Tr. 291).

When respondent testified that afternoon on direct examination, after the morning and luncheon recesses, he had a ready and positive answer to the 400-pound shrink figure on the scale ticket, *viz.*, the 400-pound shrink figure on the scale ticket should have been about 1,600 or 1,700 pounds heavier, or approximately 2,100 pounds, in addition to the 44,245 pounds of printed weight (Tr. 328-29). He testified that Don Adams "sure was" under-billed on this load, but when it was found out, it was "far too late" to correct the matter (Tr. 329). He testified (Tr. 328-29):

Q. Could you refer to Exhibit Nos. 4 [34] through 36 where there was a transaction of 87 head sold to Mr. Adams.

A. O.K.

Q. Can you tell us what occurred on this transaction?

A. I very definitely can.

Q. What happened here?

A. It costed us 16,00 or 17,00 [82] pounds out of pocket. The shrink was not added on right.

Q. All right.

A. In other words, we failed to add all the shrink.

Q. Would you explain what was done on this?

A. It looks like the cattle was sorted, shaped up, weighed, and whatever, and then when we got ready to ship them, they [83] added 400 pounds when it should have been 20-whatever, 21 or something, really the exact amount that should have gone back and we only put on 400.

Q. Where is that shown in these exhibits?

A. Excuse me?

Q. Is that shown in Exhibit No. 34 [scale ticket]?

A. Yes, sir.

There is 400 pounds added on and there should have been, oh, like 2,100 or something like that.

Q. So actually the man was underbilled on this particular load of cattle?

A. He sure was.

Q. I see.

---

[82] Respondent presumably said "16 hundred or 17 hundred," rather than "one thousand, six hundred or one thousand, seven hundred," resulting in the reporter's version with the correct figures, but with the comma in the wrong place. That respondent said "16 hundred or 17 hundred" is obvious since he testified that the shrink figure on the scale ticket should have been "2,100 or something like that" (Tr. 328), which would be 1,700 plus the 400 shown on the scale ticket.

[83] The "they" is respondent, George Saylor, according to the initials on the scale ticket (JO Ref. 229, p. 199).

A. When it was found out, it was far too late.

Hence respondent testified that instead of being invoiced for 44,645 pounds, Don Adams should have been invoiced for an additional 1,600 or 1,700 pounds, which would have totalled 46,245 pounds (44,645 + 1,600 = 46,245) or 46,345 pounds (44,645 + 1,700 = 46,345). However, as demonstrated in the preceding subsection (§ IV(B)) by (i) the cover sheet to respondent's exhibits, (ii) an analysis of every figure on respondent's worksheet, and (iii) Mrs. Manson's explanation of the worksheet, the correct total weight, according to the story told on the worksheet, is the invoice weight of 44,645 pounds. There was no mistake in computing Adams' invoice weight (based on the worksheet's fable that 12 head were substituted).

It is easy to determine what respondent had in mind in his testimony. He was saying that the scale ticket should have shown the prorated shrink of all 75 head allegedly used from the 87 head lot. That would have totalled 1,875 pounds, computed on the basis of 25 pounds per head shrink (75 ×25 = 1,875), or 1,885 pounds, as shown on the table in § IV(B), *supra*. Hence if respondent had used his pocket calculator, I assume that he would have testified tha 'he additional prorated shrink should have been 1,475 pound 1,875 −400 = 1,475).

Presumably, respondent did not mean that the alleged shrin rom all 87 head should have been shown on the scale ticket, i.e 2,185 pounds (JO Ref. 218, p. 199). The *total* shrink figure from th entire load was not shown on any of respondent's scale tickets, i the transactions involved here, nor should it have been (even if t transactions had occurred as respondent alleges). The *total* shri figure was necessary only to calculate the average shrink per he for the lot, so that when animals were allegedly removed, for exa ple "1 Crip" weighing 435 pounds at Pittsfield (JO Ref. 207, 211, 199), its weight could be increased by the average prorated shri per head, *e.g.*, 25 pounds (JO Ref. 208, 219, p. 199); and then its c culated purchase weight, *i.e.*, 460 pounds (JO Ref. 209, 210, p. 1 could be subtracted from the purchase weight of the entire lot, e 43,770 pounds in Transaction 6 (JO Ref. 206, p. 199).

However, respondent should have printed scale tickets for ev transaction showing the actual weight on the scale in Pittsfield suming, erroneously, that respondent's worksheet fables were tr which would have been 42,760 pounds in this case. Respond should have included a pencil notation as to the actual amoun prorated shrink, 1,885 pounds in this case (according to resp ent's fable) (see § VII(C), *infra*).

However, it was not respondent's practice to be honest about the total amount of shrink included in each load, even though his shrink calculations were a figment of his imagination.[84] In other words, in printing scale tickets, respondent was not even honest about his lie as to the amount of shrink in his loads.

In any event, irrespective of what weight respondent actually meant to say should have been added to the scale ticket, his explanation was nonsense. The total weight shown on the scale ticket, 44,645 pounds, is exactly correct, according to respondent's worksheet.

I infer that respondent's explanation was perjury, rather than a mistake, for several reasons.

First, respondent heard the cross-examination of his bookkeeper with respect to the 400-pound prorate figure shown on the scale ticket, and he heard her testify that she could not explain the 400 pounds of shrink on 16 head.

Second, there was a morning recess and a luncheon recess between Mrs. Manson's cross-examination on this matter and respondent's direct testimony. That gave him time to look into the matter and refresh his recollection (as to his story) from the scale ticket and worksheet.

Third, respondent testified that "I very definitely can" "tell us what occurred on this transaction" (Tr. 328). He immediately and emphatically testified that "we failed to add all the shrink," which "costed us 16,00 or 17,00 pounds out of pocket" (Tr. 328). But as shown above, respondent did not lose one pound on the transaction, according to his worksheet.

Fourth, respondent testified that he had previously discovered that Mr. Adams "sure was" "underbilled on this particular load o cattle," but that when "it was found out, it was far too late" (Tr 329). Hence, according to respondent's testimony, this was not a matter which he had suddenly discovered during the heat of testimony, without time to fully reflect on the matter, but, rather, was a

[84] There was, of course, actual transit shrink in each load. But the weight increases came from respondent's calculator, not from the shrink computations and other computations on respondent's worksheets. For example, in Transaction 4, discussed in § I, *supra*, where 24 separate circumstances show that respondent's worksheet and scale ticket were fabricated, respondent showed on the scale ticket only 955 pounds of shrink from the 33 head allegedly sorted out of Lot No. 62X, and neglected to show the additional 638 pounds of shrink from the 22 steers allegedly included from Lot No. 69 weighing 19,160 pounds (§ I(B), *supra*). (Both shrink figures were figments of respondent's imagination since neither Lot No. 62X nor Lot No. 69 was used in Transaction 4.) See, also, note 80, *supra*, explaining that respondent showed no shrink on the scale ticket for the "companion" purchase by Van Ee involved in Transaction 2.

matter which he had discovered long ago, but too late to attempt recover the 1,600 or 1,700-pound error in Mr. Adams' favor. That nonsense! If respondent had thought at any time that Adams was underbilled by 1,600 or 1,700 pounds, he would have mentioned to Mrs. Manson, who would have shown him from the worksheet, it were in existence by that time) that Adams was not underbilled by one pound. Or since respondent and Mrs. Manson testified that respondent created all of the worksheets, he could have seen for himself that there is no error on the worksheet.

Since there was no error in the mathematical computations (assuming, erroneously, that respondent substituted 12 head, as alleged), and considering the total setting set forth above, I infer that respondent's explanation was perjury, rather than a simple mistake of fact.

But irrespective of whether respondent's explanation was perjury or simply a mistake, the fatal variance between the worksheet which shows calculations involving the shrink of one steer at 3[illegible] pounds (JO Ref. 208, p. 199) and 11 steers at 275 pounds (JO Ref. 215, p. 199), for a total of 12 steers at 300 pounds prorated shrink and the scale ticket, which shows 16 head at 400 pounds prorated shrink (JO Ref. 225, 226, 227, p. 199), is a "smoking gun," which standing alone, compels me to infer that respondent's worksheet and scale ticket were fabricated to cover up respondent's pencil addition of exactly 2% to the purchase weight of the 87 steers purchased by respondent's agent for Adams, at respondent's request.

D. Twelve Additional Circumstances on Which I Base My Inference that Respondent Fabricated the Worksheet and Scale Ticket in Transaction 6 to Cover Up His Pencil Addition of Exactly 2% to the Purchase Weight of 87 Steers Purchased the Day Before by Respondent's Agent.

In addition to the four circumstances set forth above, *viz.*, (i) two of the three purchases by Van Ee for respondent had weight increases of exactly 2%, which would occur by chance only 1 time in 41,152; (ii) there is a fatal variance between the worksheet, which shows calculations involving 300 pounds of prorated shrink on 12 head, and the scale ticket, which shows 400 pounds of prorated shrink on 16 head; (iii) Mrs. Manson could not explain why the scale ticket shows 400 pounds of prorate on 16 head; and (iv) respondent's explanation was perjured nonsense, which are dispositive as to Transaction 6, I rely on the following 12 circumstances (which are incorporated by reference in other transactions, where relevant) to support my inference that respondent fabricated the

worksheet and scale ticket in Transaction 6 to cover up his addition of exactly 2% to the purchase weight of the 87 steers sold to Don Adams:

1. The invoice weight to Adams is exactly 2% more than the weight of the lot purchased for Adams the day before by respondent's agent, which would occur by chance 1 time in 351 (see §§ I(D)(4), *supra*; § XII(A), *infra*);

2. The printing of scale tickets not showing the actual weight of the livestock on the scale at Pittsfield, which respondent claims he did, would have been such a flagrant violation of law that his claim is not believable (see § VII(C)(3), *infra*);

3. Respondent's claim that he went to all the trouble involved in weighing livestock, without printing all the required scale tickets, is not believable (see § VII(C)(4), *infra*);

4. Respondent failed to call as a witness his yardman who allegedly weighed the livestock on arrival at Pittsfield, giving rise to an adverse inference (see § VIII, *infra*);

5. When complainant's investigators requested all of respondent's records on January 29, 1979, respondent and his bookkeeper failed to furnish the scale tickets for the transactions prior to Mr. Kostelecky's mid-October 1978 visit, which would have prompted them to ask for non-existent worksheets (see § IX, *infra*);

6. None of the worksheets were furnished to complainant's investigators when all of respondent's records were requested on January 29, 1979, which gives rise to the inference that they were not then in existence (see § IX(D), *infra*);

7. Respondent admittedly bought some lots on order for particular customers, which gave him the opportunity to pad weight in the lots (see § XII(B), *infra*);

8. Respondent sorts livestock in some transactions, but not others, which gave him the opportunity to pad weight (claiming he sorted) without the customer becoming suspicious (see § XII(C), *infra*);

9. Mrs. Manson wrote respondent's purchase price of the 87 steers purchased the day before on her carbon copy of the invoice to Adams (JO Ref. 198, p. 189); JO Ref. 191, p. 188), which I infer was done so that Mrs. Manson would be able to tell respondent *exactly* what his gross profit was on the transaction (see § XII(D), *infra*);

10. The number of animals allegedly added by respondent in 11 of the transactions exactly equaled the number of animals allegedly removed, even though customers ordered in approximate amounts (see § XII(E), *infra*);

11. The cumulative effect of suspicious circumstances [illegible] transactions (see § XII(G), *infra*); and

12. The ALJ, who saw and heard the witnesses testif[illegible] believe the testimony of respondent or Mrs. Manson, in [illegible] cause of their demeanor at the hearing (see § XII(H), *infra*[illegible]

Although it is not necessary to determine when the [illegible] and scale tickets were fabricated, since the scale tickets are [illegible] numbered and must be used in their proper sequence, I in[illegible] the scale ticket was fabricated on September 14, 1978, th[illegible] date as the invoice to Don Adams. I infer that the worksh[illegible] not fabricated until sometime after complainant's investiga[illegible] quested all respondent's records on January 29, 1979.

E. The Trucker's Testimony, Although Mildly Suppor[illegible] of Complainant's Position, Is Too Weak to be Rel[illegible] Upon. There Is No Testimony from the Customer, D[illegible] Adams.

Kenneth Bonnett, who runs Bonnett Trucking, testified th[illegible] company hauled the livestock in Transaction 6. He testifie[illegible] his son, George, drove the truck and that "[w]e stopped off a[illegible] field over night" (Tr. 82). He testified (Tr. 82):

> Q. Did the same cattle that you trucked into Pittsfie[illegible] leave Pittsfield the next morning for Wisconsin?
>
> A. I wouldn't know. I'd say they were.
>
> Q. What makes you think they were?
>
> A. I couldn't tell you.

He further testified that if the cattle were weighed in Pitts[illegible] would probably have been paid on that weight from Pittsfie[illegible] Lake Geneva. He testified (Tr. 83):

> Q. Now, if the cattle were weighed in Pittsfield, there would be a different weight, isn't that right?
>
> A. Yes.
>
> Q. You would have been paid on that weight from Pittsfield to Lake Geneva, is that right?
>
> A. Probably.

Although Mr. Bonnett's testimony lends no support whatever [illegible] respondent's position (*i.e.*, the fact that the truck stopped overnig[illegible] in Pittsfield, which is conceded by complainant on remand, lend[illegible] no support to respondent's position that 12 animals were substitu[illegible]

ed), it is far to weak to be relied upon by complainant. (Complainant's attorney erred in even trying to rely on such weak testimony.) Accordingly, I give no weight whatever to Mr. Bonnett's testimony. But if I were to give it any weight, it would be in complainant's favor.

The customer in Transaction 6, Don Adams, did not testify, and there is no affidavit from Adams in the record.

F. Respondent Cheated Don Adams Out of $625.45.

For the reasons set forth above, I infer that respondent's invoice weight to Don Adams of 44,645 pounds (JO Ref. 194, p. 189) was obtained by adding exactly 2%, or 875 pounds, to respondent's purchase weight of 43,770 pounds (JO Ref. 188, p. 188). Accordingly, respondent overcharged Don Adams for 875 pounds (44,645 − 43,770 = 875) at $71.48 per cwt (JO Ref. 195, p. 189), or $625.45 (8.75 × $71.48 = $625.45).

Since respondent was acting as a dealer, rather than as an agent, he was free to charge Adams whatever the traffic would bear. Respondent's purchase price was $69.03 per cwt (computed by dividing respondent's purchase price of $30,215.74 (JO Ref. 191, p. 188) by the weight, 437.70 cwt (JO Ref. 188, p. 188). His transportation charge from Springfield, Missouri, to Delavan, Wisconsin (via Pittsfield), was $1.50 per cwt (CX 6, pp. 13–14), for a total cost of $70.53 per cwt ($69.03 + $1.50 = $70.53). Subtracting respondent's cost of $70.53 per cwt from his invoice price of $71.48 per cwt (JO Ref. 195, p. 189) results in a dealer mark-up of $.95 per cwt ($71.48 − $70.53 = $.95), or almost four times the customary order buying commission of 25¢ per cwt.

It is interesting to note that Ed Van Ee, who did the actual leg work of buying the 87 steers for Adams (JO Ref. 175, 186, 187, p. 188), at respondent's request, charged respondent only 25¢ per cwt commission, *i.e.*, $109.42 (JO Ref. 190, p. 188) ($.25 × 437.70 = $109.425). Respondent, who did no more than make a telephone call to Ed Van Ee, raised that almost four times, and then got out his pocket calculator to steal $625.45 from Adams through weight fraud.

In one sense, since respondent did not perform the dealer function of sorting and substituting animals, which he claims he performed, and indicated on the scale ticket that he had performed, he was entitled to no more than the customary order buying commission of 25¢ per cwt. In that sense, respondent was entitled to no more than $109.43 profit ($.25 × 437.70 = $109.425). Instead, he made a total profit of $1,039.96, after paying Ed Van Ee's commission (Expenses: $30,215.74, purchase price (JO Ref. 191, p. 188);

$656.55, transportation (CX 6, pp. 13, 14); $47.87, insurance (JO Ref. 196, p. 189); Total expenses, $30,920.16; Respondent received $31,960.12 (JO Ref. 197, p. 189); Net profit: $31,960.12 −$30,920.16 = $1,039.96). That is 9½ times the order buying commission to which he was entitled (since he did not really perform the dealer function his scale ticket indicated he performed) ($1,039.96 ÷$109.43 = 9.5). (However, no part of the sanction is based on the fact that respondent marked up the price without performing the dealer function shown on the scale ticket.)

This, obviously, is not one of the transactions where respondent was padding the weight, but cutting the price, so as to be able to underprice a legitimate dealer. Respondent was, in this transaction, charging almost four times the normal order buying commission, plus padding the weight to gain an extra $625.45 from the padded weight.

V. In Transaction 2, 16 Circumstances Compel Me to Infer that the 67 Steers Sold to Carroll Long, Pleasant Hill, Illinois, on September 15, 1978, Were the Same 67 Steers Purchased by Respondent's Agent, Ed Van Ee, at Springfield, Missouri, on September 13, 1978, to Which Respondent Added Exactly 2% to the Weight by Pencil, and that Respondent's Worksheet, Showing 13 Steers Removed and 13 Added from Respondent's Inventory, and Scale Ticket Were Fabricated to Cover Up Respondent's Weight Padding.

A. Sixteen Circumstances Relied Upon in Transaction 2.

On September 13, 1978, respondent's agent, Ed Van Ee, bought 67 steers in Springfield, Missouri, for Carroll Long (at respondent's request) weighing 42,150 pounds for $64.55 per cwt (see § IV(A), *supra*).[85] Two days later, September 15, 1978, respondent sold 67 steers (JO Ref. 200, p. 190) to Carroll Long, Pleasant Hill, Illinois, for $66.05 per cwt (JO Ref. 202, p. 190) at an invoice weight of 42,995 pounds (JO Ref. 201, p. 190), which is an increase of 845 pounds (42,995 −42,150 = 845). That is exactly 2% more than respondent's purchase weight. That is, a person using a calculator to add exactly 2% to the purchase weight would read 843 on the calculator (.02 ×42,150 = 843), which rounds to 845.[86]

I infer that respondent increased the purchase weight 845 pounds by pencil, and fabricated the scale ticket (RX 6) and worksheet (RX 7A, 7B) (which attributes the increase to the removal of

[85] $27,206.21 ÷421.50 = $64.55 (JO Ref. 180, 183, p. 188).

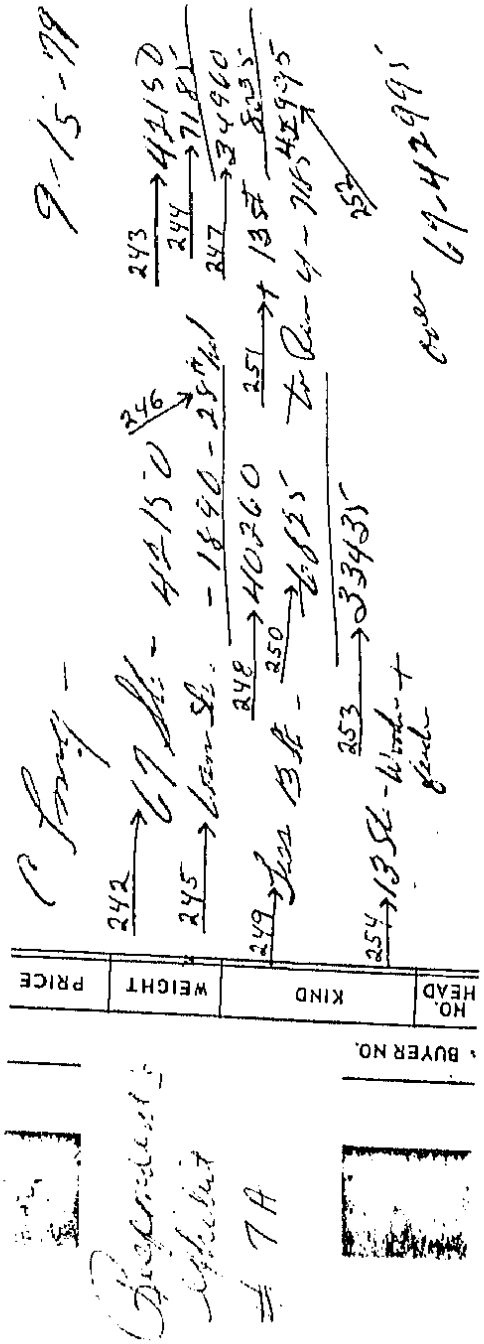
[86] For a discussion as to why respondent rounded his calculated increases of exactly 2% or exactly 3% to the nearest 5 pounds, see § I(A), *supra*.

ıead at Pittsfield and the substitution of 13 head from respond-
s inventory) [87] to cover up his fraud, *inter alia*, because of the
ıe 12 circumstances listed in § IV(D), *supra*, relating to Transac-
. 6.

ı addition, the strongest circumstance in Transaction 2, as in
nsaction 6, is the fact that Ed Van Ee's purchase of the 67
ırs for Mr. Long was one of three purchases made by Van Ee for
ɔondent's customers at Springfield, Missouri, on September 13,
3, and two of the three purchases were sold by respondent on
next day and the following day at increases of exactly 2%. That
ıld happen by chance 1 time in 41,152 times (see § IV(A), *supra*).
t circumstance, by itself, is a "smoking gun" that leads me to
r that the 2% increase here resulted from respondent's calcula-
rather than from his substitution of 13 head at Pittsfield.

ırthermore, respondent's worksheet in this transaction has two
ous mathematical flaws. The worksheet is set forth on the fol-
ing page.

Respondent's Transaction 2 Worksheet (RX 7A)



The left side of respondent's worksheet shows the purchase weight of the 67 steers, 42,150 pounds (JO Ref. 242, p. 226), the total transit shrink, 1,890 pounds (JO Ref. 245, p. 226), and the Pittsfield weight of the 67 steers, 40,260 pounds (JO Ref. 248, p. 226; Tr. 230). Dividing the transit shrink by the 67 head results in an average transit shrink of 28 pounds per head (JO Ref. 246, p. 226) (1,890 ÷ 67 = 28.2, which rounds to 28). The worksheet then shows the weight of the 13 steers allegedly removed, 6,825 pounds (JO Ref. 249, 250, p. 226), leaving an actual weight of 33,435 pounds for the 54 steers remaining (JO Ref. 253, p. 226).

The right-hand side of the worksheet again shows the purchase weight of the 67 steers, 42,150 pounds (JO Ref. 243, p. 226), from which the worksheet subtracts 7,185 pounds (JO Ref. 244, p. 226), respondent's computed purchase weight of the 13 steers allegedly removed. This is where respondent's worksheet has its first mathematical error. The alleged Pittsfield weight of the 13 steers removed was 6,825 pounds (JO Ref. 249, 250, p. 226). Adding 365 pounds shrink (28 × 13 = 364, which rounds to 365) would result in a computed purchase weight for the 13 steers allegedly removed of 7,190 pounds (6,825 + 365 = 7,190). Instead of subtracting 7,190 pounds from the purchase weight of the 67 steers, the worksheet subtracts 7,185 pounds (JO Ref. 244, p. 226).

Notwithstanding that mistake, the worksheet gets the right final result because when 7,185 pounds is subtracted from 42,150 pounds, another "mistake" appears, *i.e.*, the result is 34,960 pounds (JO Ref. 247, p. 226), instead of the correct figure of 34,965 pounds (42,150 —7,185 = 34,965; not 34,960). That is a difficult mistake to make. Whether you use a calculator or subtract mentally, when you subtract "5" from "0", it is difficult to get "0," instead of the correct "5," as the remainder.

Following those two consecutive "mistakes," when the worksheet added the weight of the 13 steers allegedly substituted from respondent's inventory, 8,035 pounds (JO Ref. 251, p. 226), the e result is 42,995 pounds (JO Ref. 252, p. 226) (34,960 + 8,035 = 42,995), the weight invoiced to Long, which, according to respondent, just happens, by chance, to be the same weight he would have gotten by adding 2% with his pocket calculator to his purchase weight.

In some situations, the saying "All's well that ends well" is applicable. But not here! I infer that respondent's worksheet was fabricated notwithstanding its "happy" ending that agrees with respondent's invoice weight to Long. The "correct" result, notwithstanding two consecutive mathematical "errors," makes one be-

lieve that the worksheet was fabricated to explain the invoi weight.

I infer that only one mistake was made, *viz.*, that the corre weight of 7,190 pounds was calculated on a scratch pad, but th 7,185 was carelessly copied onto the worksheet (JO Ref. 244, p. 22 If "7,190" is substituted for "7,185" (JO Ref. 244, p. 226), the co putation is mathematically correct. The figure of 7,185 (instead o 7,190) could have been carelessly copied because four other figure in the immediate area end in "5" (JO Ref. 250, 251, 252, 253, p 226). It would have been easy to make a mistake in copying the fig ures from a scratch pad to a worksheet by making one more figure end in "5".

Finally, in view of very special circumstances, I give a litt weight in this Transaction 2 to the trip sheet information writte by Mrs. Manson. The trip sheet for Transaction 2 is set forth o the next page (CX 2, p. 13). Trip sheets for Transaction 6 (CX 6, p 13), Transaction 8 (CX 8, p. 8), Transaction 9 (CX 9, p. 8), and Transaction 11 (CX 12, p. 13) are set forth on the following pages for comparison purposes.

Transaction 2 Trip Sheet (CX 2, p. 13)

TRIP SHEET

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE: (217) 285-6186 (217) 285-4011

Date 9-14-78 Pro

Driver Mel

Co-Driver's Name

CONSIGNEE Carroll Long SNIPPER Saylor L18 Tractor No.

DESTINATION Hill, Illinois ORIGIN Springfield, Mo. Trailer No.

Quantity	# 2788 Description	Weight		OFFICE ONLY
67	Stu (Springfield)	42150	@ 70	Rev.
				%
				Amt.
			295.05	

MILES RUN IN FOLLOWING STATES ON THIS TRIP:

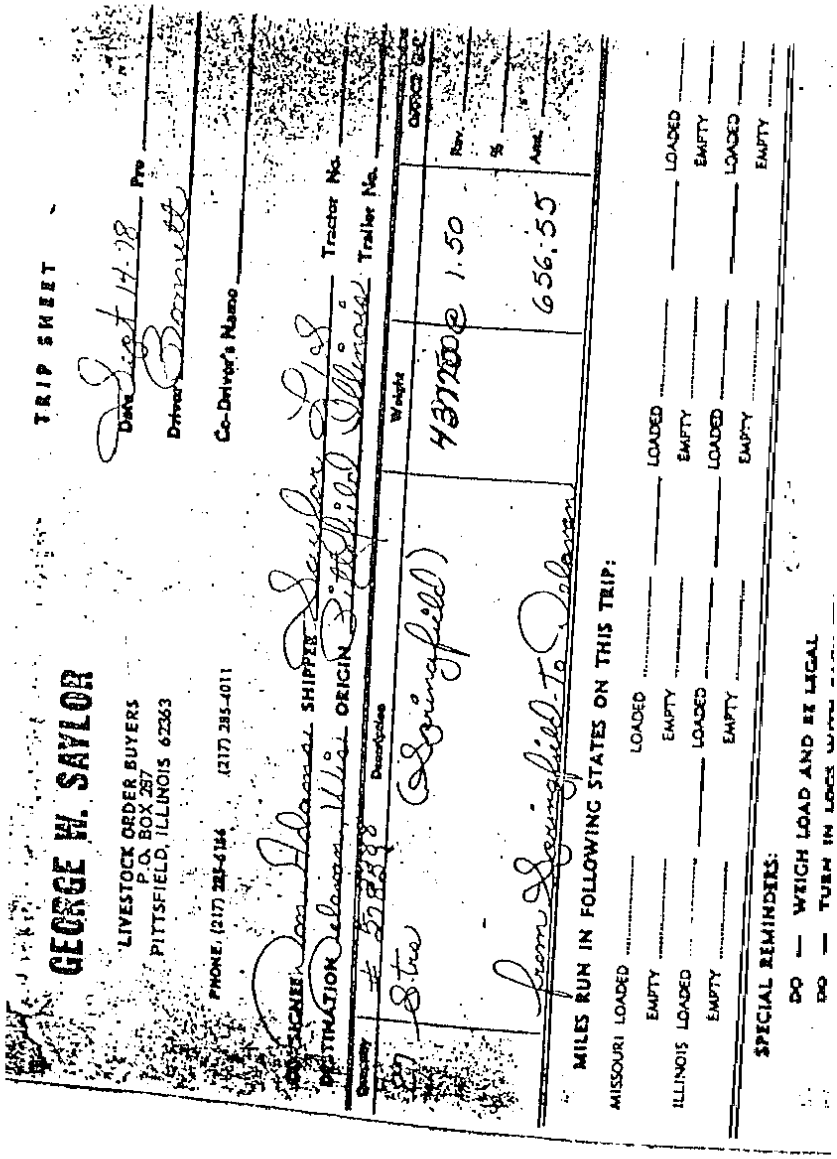
MISSOURI	LOADED	LOADED	LOADED	LOADED
	EMPTY	EMPTY	EMPTY	EMPTY
ILLINOIS	LOADED	LOADED	LOADED	LOADED
	EMPTY	EMPTY	EMPTY	EMPTY

SPECIAL REMINDERS:

DO — WEIGH LOAD AND BE LEGAL

DO — TURN IN LOGS WITH EACH TRIP SHEET AND KEEP UP TO DATE!

Transaction 6 Trip Sheet (CX 6, p. 13)



GEORGE H. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363
PHONE: (217) 285-6184 (217) 285-4011

TRIP SHEET

Date Sept 14-78 Pro

Driver Bennett

Co-Driver's Name

CONSIGNEE Sam Albaugh SHIPPER Saylor Pittsfield Ill.

DESTINATION Albaugh, Ill. ORIGIN Pittsfield Illinois

Tractor No.

Trailer No.

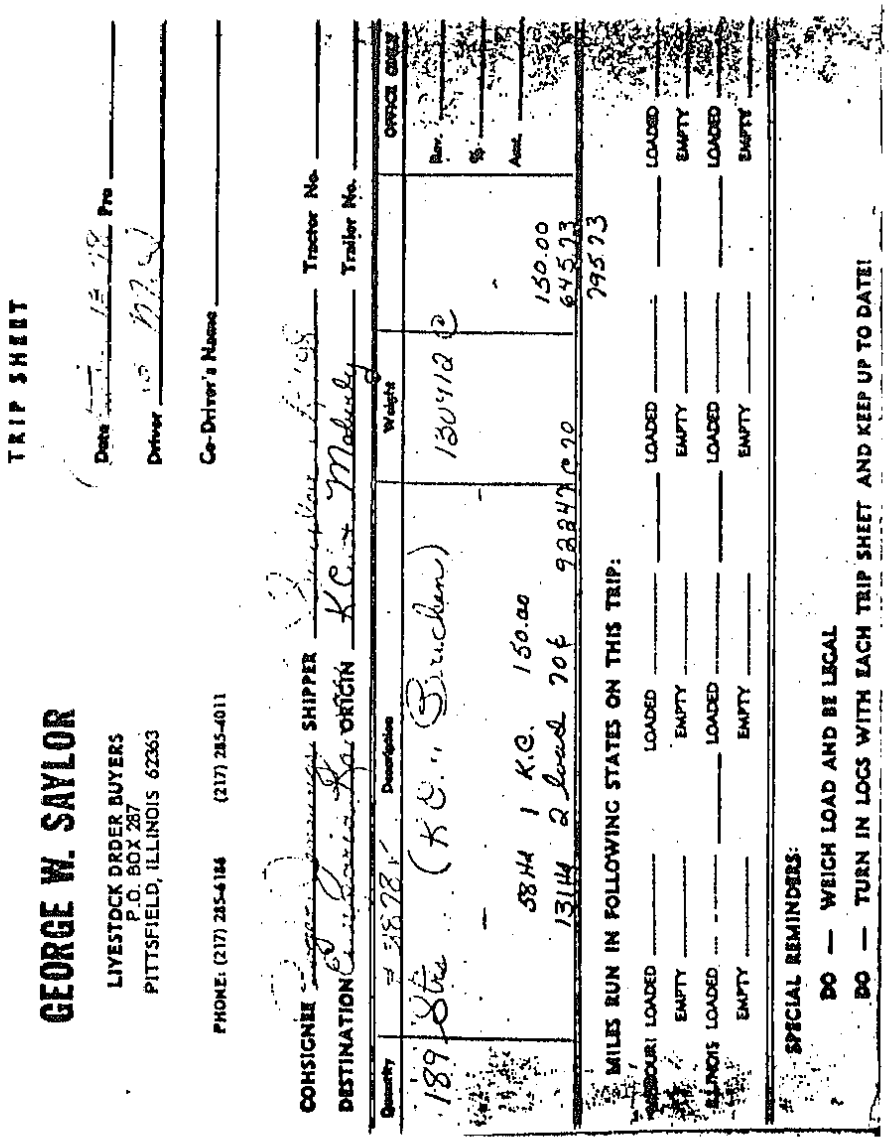
Quantity	Description	Weight	Price	Rate	%	Amt.
150	# 50 Bags 8 tra	43750	@ 1.50			656.55
	from Springfield to Albaugh					

MILES RUN IN FOLLOWING STATES ON THIS TRIP:

MISSOURI LOADED ..... LOADED ..... LOADED ..... LOADED .....
EMPTY ..... EMPTY ..... EMPTY ..... EMPTY .....
ILLINOIS LOADED ..... LOADED ..... LOADED ..... LOADED .....
EMPTY ..... EMPTY ..... EMPTY ..... EMPTY .....

SPECIAL REMINDERS:
DO — WEIGH LOAD AND BE LEGAL
DO — TURN IN LOGS

Transaction 8 Trip Sheet (CX 8, p. 8)



TRIP SHEET

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE: (217) 285-6184 (217) 285-4011

Date 12-18-78 Pro

Driver

Co-Driver's Name

CONSIGNEE SHIPPER Tractor No.

DESTINATION ORIGIN KC Mahady Trailor No.

Quantity	Description	Weight	OFFICE ONLY
189	Ste (KC Bracken)	130412	Rec.
			%
			Amt.
	58H 1 K.C. 150.00		150.00
	13H 2 load 70¢	92847	64523
			29523

MILES RUN IN FOLLOWING STATES ON THIS TRIP:

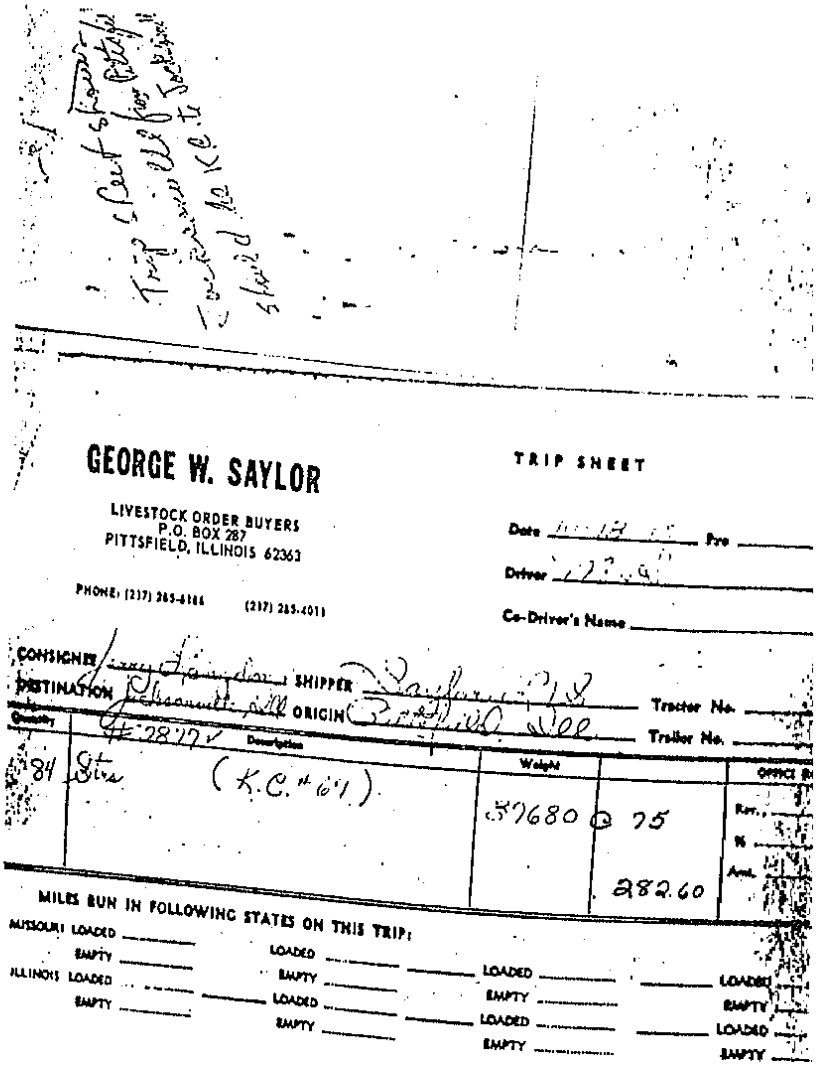
MISSOURI: LOADED ____ LOADED ____ LOADED ____ LOADED ____
EMPTY ____ EMPTY ____ EMPTY ____ EMPTY ____
ILLINOIS LOADED ____ LOADED ____ LOADED ____ LOADED ____
EMPTY ____ EMPTY ____ EMPTY ____ EMPTY ____

SPECIAL REMINDERS:

DO — WEIGH LOAD AND BE LEGAL

DO — TURN IN LOGS WITH EACH TRIP SHEET AND KEEP UP TO DATE!

Transaction 9 Trip Sheet And Note By Mr. Gentry (CX 9, p. 8)



GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE: (217) 285-6186 (217) 285-4011

TRIP SHEET

Date _____ Pro _____

Driver _____

Co-Driver's Name _____

CONSIGNEE _____ SHIPPER _____

DESTINATION _____ ORIGIN _____

Tractor No. _____

Trailer No. _____

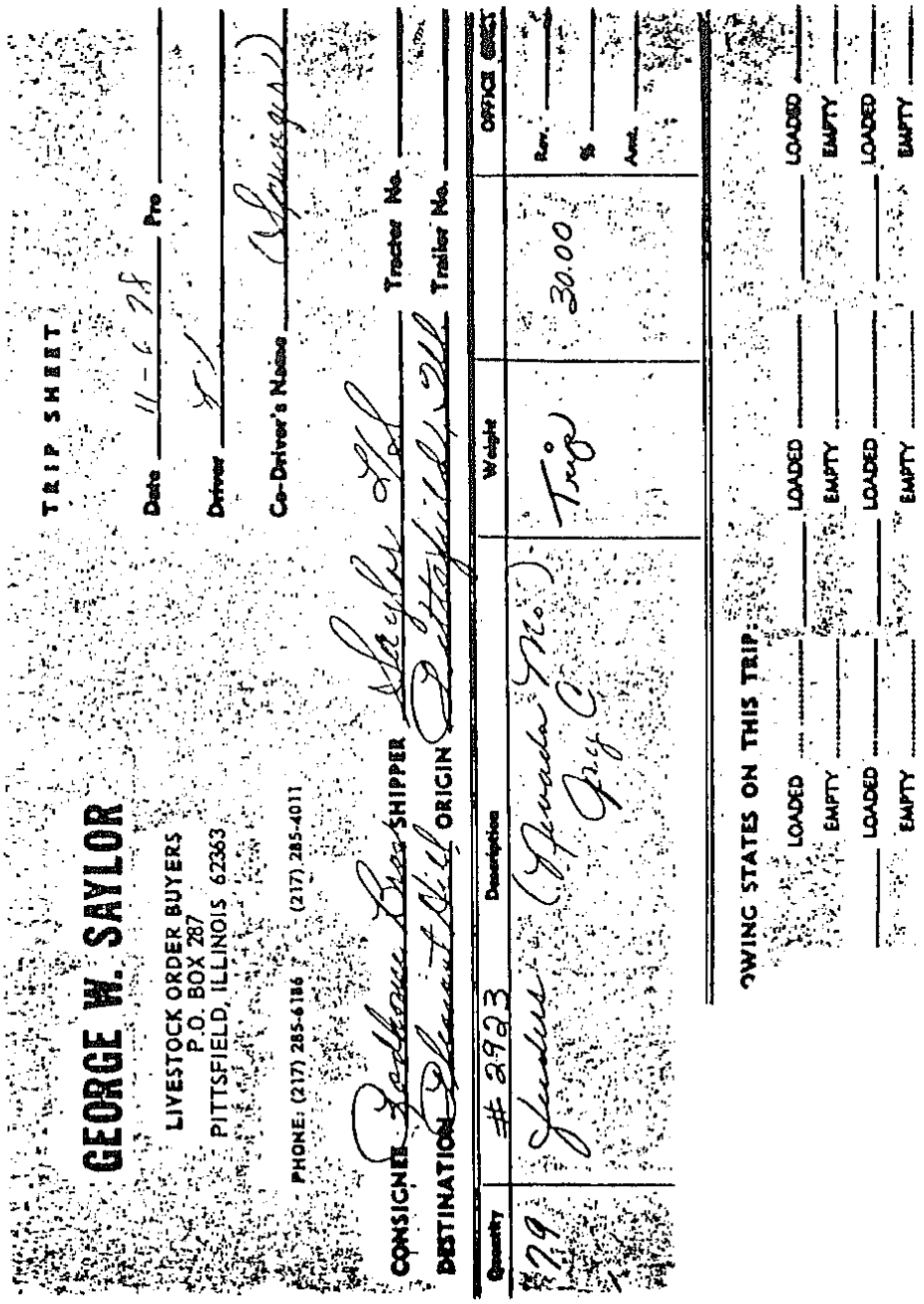
Quantity	Description	Weight		Office Rec.
84 Strs	(K.C. #61)	37680	@ 75	Rec.
			282.60	W
				Amt.

MILES RUN IN FOLLOWING STATES ON THIS TRIP:

MISSOURI LOADED _____ EMPTY _____ LOADED _____ EMPTY _____ LOADED _____ EMPTY _____ LOADED _____ EMPTY _____

ILLINOIS LOADED _____ EMPTY _____ LOADED _____ EMPTY _____ LOADED _____ EMPTY _____ LOADED _____ EMPTY _____

Transaction 11 Trip Sheet (CX 12, p. 13)



TRIP SHEET

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE: (217) 285-6186 (217) 285-4011

Date 11-6-78 Pro

Driver

Co-Driver's Name (Spouse)

CONSIGNEE Jackson Bros SHIPPER Stephens Hd Tractor No.

DESTINATION Pittsfield ORIGIN Pittsfield Ill Trailer No.

Quantity	Description	Weight	OFFICE USE ONLY
79	#2923 Steers (Female No. Grade C)	Trip	30.00

Rev.
$
Amt.

OWING STATES ON THIS TRIP:

LOADED ____ LOADED ____ LOADED ____
EMPTY ____ EMPTY ____ EMPTY ____
LOADED ____ LOADED ____ LOADED ____
EMPTY ____ EMPTY ____ EMPTY ____

None of these trip sheets has been enhanced, so that the read can clearly see that the origin and destination data (as well other data) on all these trip sheets are in Mrs. Manson's "distin tive feminine handwriting."

The first two trip sheets, for Transactions 2 and 6, are the tw trip sheets involved in Van Ee's purchases for Long and Adam where both of respondent's invoices contain increases of exactly 2 (at odds of 1 in 41,152).

Mrs. Manson testified that the truck drivers filled out the origi and destination information on the trip sheets. She testified (Tr 186):

> Q. Mrs. Manson, you write the checks to truckers, is that right?
>
> A. Yes, I do.
>
> Q. There is a date on the bottom of the check, is that the date the livestock was hauled?
>
> A. The date it was hauled?
>
> Q. Yes.
>
> A. That is the date the boys turned in on their trip sheet.
>
> Q. Who are the boys?
>
> A. I consider them boys, the drivers.
>
> Q. Who fills out the trip sheets?
>
> A. The drivers.
>
> Q. Do they fill it out in its entirety?
>
> A. What do you mean, its entirety?
>
> Q. All entries thereon.
>
> A. I do writing on them but if they don't turn them in they don't get paid.
>
> Q. What entries do the boys put on the trip sheets?
>
> A. Where the cattle was loaded, where they took them, the head count, miles.

The documentary evidence reproduced above shows that her testimony was false. In this respect, it should be noted that Mrs. Manson was not testifying as to trip sheets in general. She was testifying about the trip sheets in this case. She had ample time to

review the trip sheets before testifying. She must have known that she wrote the origin and destination information on the trip sheets reproduced above, which relate to almost half (5 of 11) of the transactions in which trip sheets were found (there were no trip sheets for Transactions 1, 5 and 14). Hence I infer that her testimony was deliberately false. (Note, also, that her initial answer to "Who fills out the trip sheets?" was "The drivers." It was only after complainant's attorney pursued the matter that she admitted that she does "writing on them.")

Respondent's attorney attempts to save Mrs. Manson's false answer by arguing (Respondent's Reply to Complainant's Opening Brief on Remand at 1):

> The bookkeeper testified that both she and the truck driver wrote on the trip sheets. See Tr. 186. It is incomprehensible how the complainant can attempt to twist this innocuous testimony into some kind of purported lie.

However, Mrs. Manson not only testified that "she and the truck driver wrote on the trip sheets," but she specified who wrote what! She testified that the drivers wrote "[w]here the cattle was loaded, where they took them" (Tr. 186). That translates into "ORIGIN" and "DESTINATION" on the trip sheets. Her testimony that the drivers wrote the origin and destination information was not true as to 5 of the 11 trip sheets in this case.

Turning back to the trip sheets for Transactions 2 and 6, reproduced above, in Transaction 6, in which complainant concedes on remand that the truck passed through Pittsfield enroute to the customer (the invoice is dated September 14, 1978, and the customer's check is dated September 15, 1978), Mrs. Manson wrote "SHIPPER Saylor L/S," ORIGIN Pittsfield, Illinois," "DESTINATION Delavan, Wis" (CX 6, p. 13). In the "Description" she wrote "(Springfield)" and "from Springfield to Delavan." Although there is no specific place on the trip sheet to show a stop at Pittsfield, this is how Mrs. Manson indicated the Pittsfield stop in Transaction 6 on September 14, 1978.

On the same day, September 14, 1978, Mrs. Manson wrote the trip sheet for Transaction 2, in which complainant does not concede that the truck passed through Pittsfield enroute to the customer (the invoice is dated September 15, 1978, and the customer's check is dated September 18, 1978). The steers in Transactions 2 and 6 were bought at the same time, September 13, 1978, by the same person, Ed Van Ee, at the same place, Union Stock Yards, Springfield, Missouri, and the trip sheets were written by the same person, Mrs. Manson, on the same day, September 14, 1978.

In Transaction 2, Mrs. Manson wrote the same information fo "SHIPPER," as in Transaction 6, *i.e.*, "Saylor L/S," but in Transa tion 2 she wrote "ORIGIN Springfield, Mo," and "DESTINATIO P. Hill, Illinois" (CX 2, p. 13), whereas in Transaction 6 she wro "ORIGIN Pittsfield, Illinois" (CX 6, p. 13).

Since these two trip sheets were written on the same day by same person, Mrs. Manson, relating to livestock purchased at same time and place by the same agent, Ed Van Ee, I give so weight to the fact that Mrs. Manson showed Pittsfield as the ori of Transaction 6, and also showed in Transaction 6 that the to trip was "from Springfield to Delavan," but she completely omitt Pittsfield from the trip sheet in Transaction 2.

Similarly, in Transactions 9 (CX 9, p. 8) and 11 (CX 12, p. 13), which complainant concedes on remand that the truck we through Pittsfield enroute to the customer, Mrs. Manson show "Saylor L/S" as the "SHIPPER," and "Pittsfield, Ill." as th "ORIGIN." But in Transaction 2, she wrote "Springfield, Mo." a the "ORIGIN," without any mention of Pittsfield on the tri sheet.[88]

I do not regard Mrs. Manson's trip sheet data as dispositive o Transaction 2. In fact, its weight is trivial compared to the fac that the invoices in Transactions 2 and 6 both had increases of ex actly 2%, which would happen by chance 1 time in 41,152. Howev er, it is one of the circumstances on which I base my inference in Transaction 2.[89]

For the foregoi

253, 251, p. 226), or 1,525 pounds less than the printed weights (42,995 −41,470 = 1,525).

In addition, the scale ticket has a notation that the steers were "from Springfield" and "Woodenfeeder" (RX 6). The "Woodenfeeder" is one of respondent's pens (Tr. 145-46). Respondent's worksheet also shows that the 13 steers were added from respondent's "Woodenfeeder" (JO Ref. 254, p. 226).

However, as shown above, 13 steers were not added from respondent's "Woodenfeeder." The invoice weight to Long resulted from respondent's addition of 2% to his purchase weight. Accordingly, I infer that the scale ticket was fabricated without any livestock on the scale.

Here, as in the case of most of the alleged reweighing transactions, I infer that the scale ticket was fabricated on the same day the 67 steers were sold to Long, so that the serial numbers would be in the proper sequence, and that the worksheet was fabricated sometime after January 29, 1979, when all of respondent's records were requested by complainant's investigators.

B. Respondent Cheated Long Out of $558.12 in Transaction 2. The Fact that Long Was a Satisfied Customer Is Irrelevant.

Respondent cheated Long out of $558.12 by the 845-pound pencilweight addition (8.45 ×$66.05 = $558.12). This was not one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $105.38 on this transaction ($.25 ×421.50 = $105.38). Respondent's net profit was $891.94 (Expenses: $27,206.21, purchase price (RX 5); $295.05, transportation (CX 2, pp. 13, 14); $42.60, insurance (RX 8); $5, telephone call to Van Ee (estimated); Total expenses, $27,548.86; Respondent received $28,440.80 (RX 8); Net profit: $28,440.80 −$27,548.86 = $891.94). Subtracting respondent's weight-padding profit of $558.12 from his total profit of $891.94 would have resulted in a profit of $333.82 without weight padding, or $228.44 more than a legitimate order buyer's profit at 25¢ per cwt commission ($333.82 −$105.38 = $228.44).

It is interesting to note that Van Ee, who did the actual leg work of buying the 67 steers at respondent's request for Long (JO Ref. 175, 178, p. 188), charged respondent $105.37 commission (JO Ref. 182, p. 188), *i.e.*, 25¢ per cwt ($.25 ×421.50 = $105.38). Respondent, who did no more than make a phone call to Van Ee, made a dealer mark-up of $333.82, *i.e.*, over three times as much as Van Ee's charge to respondent (which is fine, under our free enterprise

system). But it is outrageous that respondent then stole an tional $558.12 from Long by adding 2% to the purchase w with his pocket calculator.

Carroll Long testified that he knew that respondent sorted stock, but he had never observed respondent sort livestock (Tr. He was satisfied with respondent's livestock transactions (Tr. 68), but he never weighed livestock delivered by respondent s he did not own a scale (Tr. 68). The fact that Long was a sati customer is irrelevant in determining the sanction in this case § XIX, *infra*).

VI. In Transaction 8, Nine Circumstances Lead Me to Infer t When Respondent Sold 189 Steers to Roger Jennings, Palmy Illinois, on October 13, 1978, Respondent Added 10 Pounds l Head by Pencil to 58 Steers Purchased at Kansas City as l No. 62, and that Respondent Did Not Make a Mistake in Co puting the Pencil Shrink on 85 Steers Purchased in Huntsvi Missouri, as He Claims.

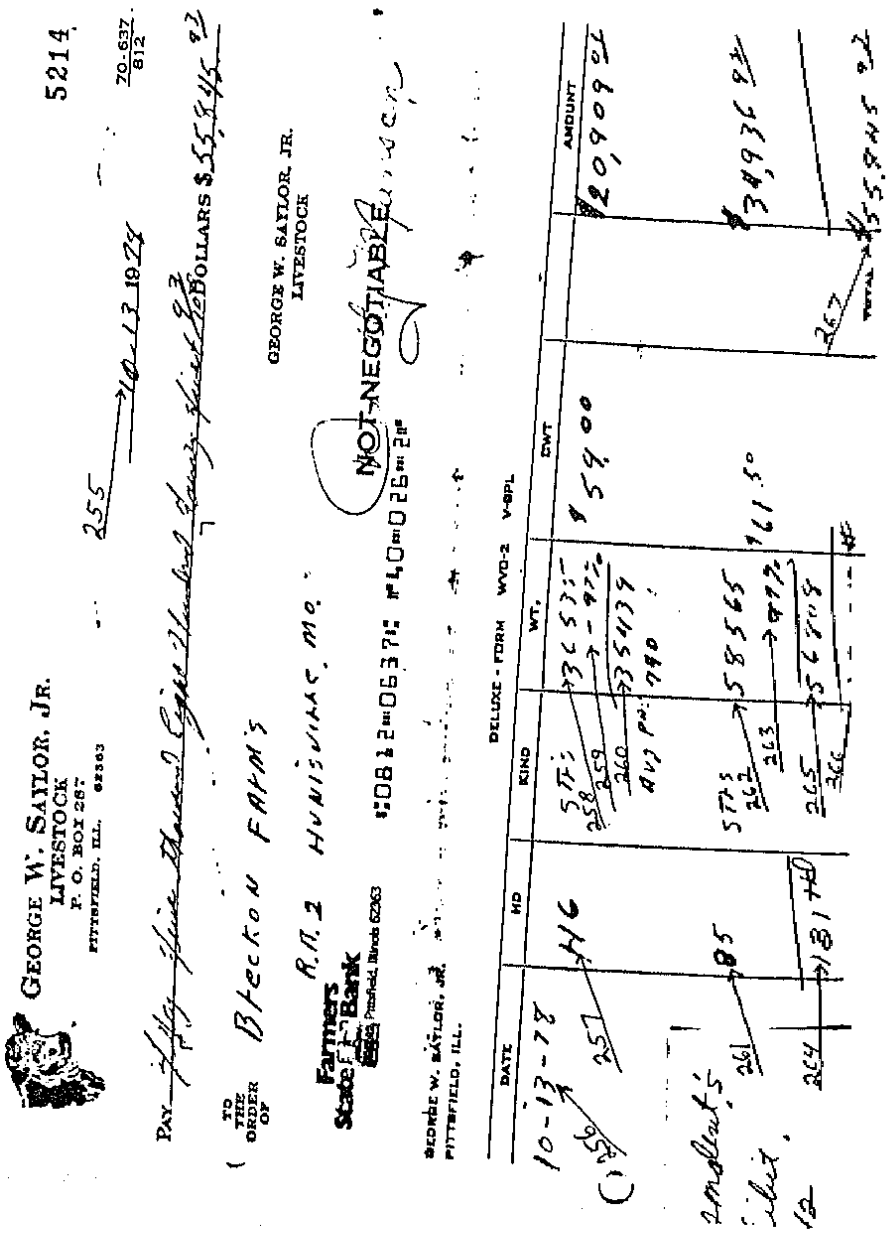
Transaction 8 is the only transaction in which respondent adm that the livestock did not come to Pittsfield (geography would ha precluded such a claim since the livestock was delivered fro Kansas City and Huntsville, Missouri, to a feedlot in Empori Kansas). Nonetheless, the invoice weight was admittedly substa tially higher (580 pounds actually—586 pounds according to r spondent) than respondent's purchase weight, and the increase fi into the typical "neat" formula of the other 13 transactions (se § XII(A), *infra*), *i.e.*, here it was 10 pounds per head on 58 stee purchased without pencil shrink.

Nine circumstances lead me to infer that the 580-pound weig increase resulted from respondent's deliberate pencil addition rather than from respondent's error in computing the pencil shrink on one of the two lots (85 head) purchased with pencil shrink, as claimed by respondent.

A. Respondent Purchased 58 Steers in Kansas City on October 12, 1978, Without "Pencil Shrink," Weighing 38,665 Pounds. At About the Same Time, Respondent Purchased 131 Steers, Consisting of 46 Head and 85 Head, in Huntsville, Missouri, with 3% "Pencil Shrink," Resulting in Respondent Paying for 92,247 Pounds. The Three Lots Totalled 189 Head, and Respondent Paid for a Total of 130,912 Pounds. Respondent Sold the 189 Head to Roger Jennings on October 13, 1978, at 131,492 Pounds. 580 Pounds More Than

Respondent's check and check stub dated October 13, 1978, for the purchase of 131 head of steers at Huntsville, Missouri, with 3% pencil shrink is reproduced on the next page (RX 42), respondent's October 12, 1978, purchase invoice for Kansas City Lot No. 62 consisting of 58 steers is set forth on the following page (RX 41), and respondent's invoice to Roger Jennings dated October 13, 1978, for the 189 head is set forth on the third page following this (RX 44).

Respondent's Check and Check Stub (RX 42)



GEORGE W. SAYLOR, JR.
LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILL. 62363

5214

70-637
812

255

10-13-1978

PAY Fifty five thousand Eight Hundred Forty Four Dollars $55,844.92

TO THE ORDER OF Beckon Farms
R.R. 2 Hunnisville Mo.

Farmers State Bank
Pittsfield, Illinois 62363

⑆081206371⑈ ⑈40026⑈ 2⑈

GEORGE W. SAYLOR, JR.
LIVESTOCK

NOT NEGOTIABLE

GEORGE W. SAYLOR, JR.
PITTSFIELD, ILL.

DELUXE - FORM WVO-2 V-9PL

DATE	NO	KIND	WT.	DWT	AMOUNT
10-13-78	46	STRS 258 259 260 Avg Pr: 790	36,533 - 9,000 35,439	$54.00	$20,909.02
Amount's	85	STRS 262 263	58,565 - 9,000	61.50	$34,936.82
Check 12	181	265 266	56,715		267 $55,844.92

Kansas City Invoice For Lot No. 62, October 12, 1978 (RX 41)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

528 LIVESTOCK EXCHANGE BUILDING — KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3205
SAM CAMPBELL 816-333-5378
J. HAROLD SCHMIDT 816-331-4658
ED GORMAN Bonner Springs, Kansas 913-721-2086
WILL H. CORSON 913-432-0846
OFFICE GLORIA EVANS

Area Code 816
PHONE 842-3355

Bought for the Account of —
GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

269 → no. 62

Date 12 Oct 1978 19.....
268 → Shipped [illegible]
270 → Via [illegible]

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	16	[illegible]			10885	17.77	64.90	6975.55	
[illegible]	28				18225	17.74	64.90	12215.08	
[illegible]	8				5120	18.79	62.90	3221.50	
[illegible]	1				645		62.90	405.81	
[illegible]	5				3240	18.85	55.60	1802.64	
271 →	58		272 →		38665				24613.78

Average Weight 667
Average Cost 63.76

VACC., DEHORNING, BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	
COMMISSION	386.7
TOTAL	

Respondent's exhibit 1 #41

Transaction 8 Invoice Copied From Respondent's Records (RX 44)

GEORGE L. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

SOLD TO

DATE _____ 19

NO.	KIND	WEIGHT	PRICE	AMOUNT
274	275 Buchna K.C	36,055	65.00	23,435.75
279	280	35,439	277 62.50 278	22,149.37
283	284	131492	281 282	84,583.92
	114 636#	285		137.14
			286	84,710.96
	Respondent's Exhibit #44			
	Bd Ck# 5258 -177.38			
				287 80,198.58

Adjustment Bd Ck # 7920
586 # @ 65.00 # 380.90

Signed _____

WE APPRECIATE YOUR PATRONAGE

The record does not show respondent's purchase date of the 131 head purchased from Breckon Farms, Huntsville, Missouri, but his check and check stub are dated October 13, 1978 (JO Ref. 255, 256, p. 244). Respondent's purchase from Breckon Farms totalled 131 head (JO Ref. 264, p. 244), consisting of one lot of 46 head (JO Ref. 257, p. 244) and one of 85 head (JO Ref. 261, p. 244). Both lots were purchased with a 3% "pencil shrink," *i.e.*, respondent paid for only 97% of the scale weight (JO Ref. 259, 263, p. 244).

Specifically, with 3% pencil shrink, respondent paid for only 35,439 pounds (JO Ref. 260, p. 244) of the actual weight, 36,535 pounds (JO Ref. 258, p. 244), of the 46 head lot. Similarly, respondent paid for only 56,808 pounds (JO Ref. 265, p. 244) of the actual weight, 58,565 pounds (JO Ref. 262, p. 244), of the 85 head lot. After deducting the "pencil shrink," respondent paid for 92,247 pounds (JO Ref. 266, p. 244) for the two lots totalling 131 head (JO Ref. 264, p. 244).

On October 12, 1978, respondent purchased 58 head (JO Ref. 271, p. 245) weighing 38,665 pounds (JO Ref. 272, p. 245) at Kansas City as Lot No. 62 (JO Ref. 269, p. 245). Respondent had these 58 head shipped directly to "Jennings, Emporia," Kansas (JO Ref. 268, p. 245), via M&I Truck Line, Inc. (JO Ref. 270, p. 245).

Respondent's total purchase weight for the 189 head in the three lots was 130,912 pounds, consisting of 92,247 pounds for the 131 head purchased with pencil shrink (JO Ref. 266, p. 244), and 38,665 pounds for the 58 head purchased at Kansas City (JO Ref. 272, p. 245) (92,247 + 38,665 = 130,912).

When a dealer purchases livestock with pencil shrink, and sells the livestock on the basis of his purchase weight, he is required to pass on the pencil shrink to his purchaser (see § VII(B), *infra*). In addition, Mr. Jennings' affidavit states that the "Saylor cattle purchase on the farm in Missouri was purchased with a 3% shrink and Saylor was to transfer this shrink to us. That is we were to pay for the weight which Saylor paid for" (CX 17, p. 5). Mr. Jennings further stated that "[t]he cattle purchased for us at the Kansas City auction by Saylor was to have been turned to us at the same weight for which Saylor paid" (CX 17, p. 5).

Instead of invoicing Jennings for respondent's purchase weights for the 189 head totalling 130,912 pounds, respondent invoiced Jennings for 131,492 pounds (JO Ref. 283, 284, p. 246),[90] which is exact-

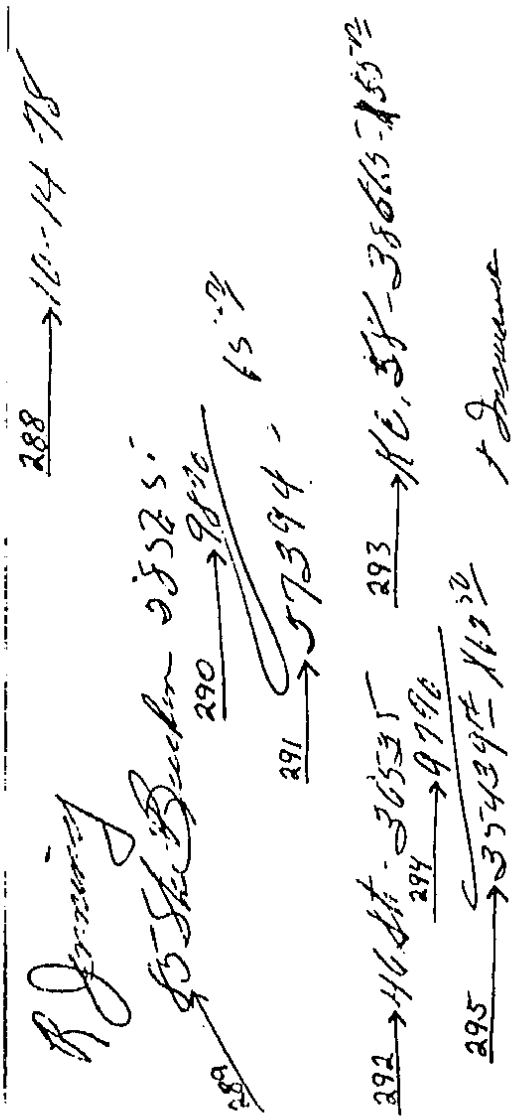
[90] When livestock is sold with pencil shrink, it necessarily involves a calculated weight and, therefore, the weight does not have to end in "5" or "0," as in the case of livestock weighed, or allegedly weighed, on a scale weighing to the nearest 5 pounds. (Footnote 92 follows.)

ly 580 pounds more than respondent's purchase weights (131,
– 130,912 = 580).

B. Respondent's Worksheet Shows that Jennings Was Charged on the Basis of 2% Pencil Shrink, Rather than 3% Pencil Shrink, on the 85 Head Lot Purchased at Breckon Farms, for a Mathematical "Error" of 586 Pounds, Which Does Not Precisely Explain the Invoice "Error." However, the Pencil Addition of 10 Pounds Per Head on the 58 Head Lot Purchased at Kansas City Without Pencil Shrink Does Precisely Explain the Invoice "Error." Mrs. Manson Paid Breckon Farms at the Correct 3% Shrink Rate on the Same Date She Invoiced Jennings for an Extra 580 Pounds.

Respondent's worksheet for Transaction 8 is set forth on the next page (RX 43).

Transaction 8 Worksheet (RX 43)



Respondent's worksheet for Transaction 8, which is dated October 14, 1978 (JO Ref. 288, p. 249), the day *after* the date of the invoice to the customer, Jennings, shows that the weight of the steers purchased from Breckon Farms weighing 58,565 pounds (JO Ref. 289, p. 249) was computed on the basis of 2% shrink, rather than 3%, so that the scale weight was multiplied by 98% (JO Ref. 290, p. 249), rather than 97%, resulting in a computed weight of 57,394 pounds (JO Ref. 291, p. 249), rather than the weight respondent paid for (with 3% shrink), *i.e.*, 56,808 pounds (JO Ref. 265, p. 244). This claimed mathematical error in computing the pencil shrink at 2%, rather than 3%, would result in an invoice error of 586 pounds (57,394 − 56,808 = 586).

However, this 6-pound alleged error in computing pencil shrink on the 85-head lot purchased at Breckon Farms does not explain why respondent's invoice to Jennings is for 580 pounds—not 586 pounds—more than respondent's purchase weights (see § VI(A), immediately above).

The three weights shown on the worksheet, which was allegedly used by Mrs. Manson to prepare the invoice to Jennings, are 57,394 pounds for the 85-head lot (JO Ref. 289, 291, p. 249), 35,439 pounds for the 46-head lot (JO Ref. 292, 295, p. 249), and 38,665 pounds for the 58-head lot purchased at Kansas City without pencil shrink (JO Ref. 293, p. 249). These three weights total 131,498 pounds (57,394 + 35,439 + 38,665 = 131,498), not 131,492 pounds, as shown on the invoice to Jennings (JO Ref. 284, p. 246). Hence in the same transaction in which respondent allegedly made a mistake on the worksheet in computing the pencil shrink on one (and only one!) of the two lots purchased simultaneously at Breckon Farms (both with the same 3% shrink), and respondent allegedly made a mistake in dating the worksheet the day after the invoice to Jennings, Mrs Manson presumably made an error of 6 pounds in adding the weights of the three lots, as allegedly shown on the worksheet. In view of that 6-pound "error," the worksheet does not precisely explain the 580-pound weight increase.

On the other hand, complainant's explanation does precisely explain the 580-pound weight increase. Respondent simply decided to add 10 pounds per head to the 58-head lot purchased in Kansas City. When forced to come up with an explanation for the 580-pound weight increase in Transaction 8, respondent noticed that it was almost exactly equal to a 1% weight increase on the 85-head lot, and concocted the story that he erroneously computed the shrink on the 85-head lot at 2%, instead of 3%.

Respondent's explanation as to his alleged error in calculating the pencil shrink is very brief. Respondent testified (Tr. 332):

Q. Also was there a mistake made in calculating the percentage in this particular load?

A. That was my mistake. I figured part of them at 98 per cent and I figured 46 of the cattle at 97 per cent which would be a fault of mine.

Q. Mr. Saylor, this deal was completely straightened out with Mr. Jennings as far as the shrink was figured out. In other words, you were supposed to transfer the shrink from Mr. Jennings?

A. Right.

Q. That has been completely straightened out?

A. Yes, sir.

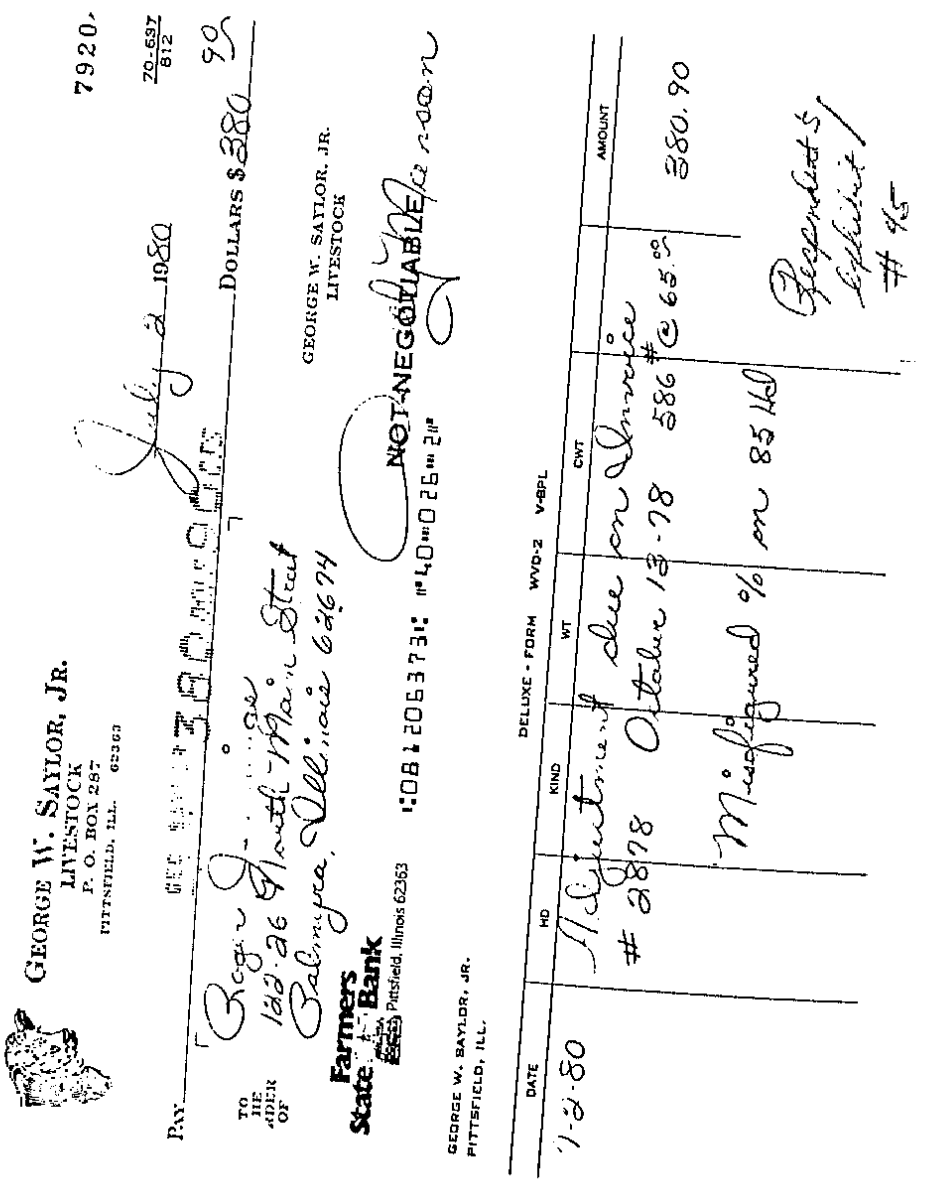
spondent gave no explanation as to why he would think that 35-head lot purchased at Breckon Farms should be computed at pencil shrink when the 46-head lot purchased at the same time at the same place was computed at 3% pencil shrink. Two lots l be purchased at the same time with different shrinks if there particular reasons why one lot might be expected to shrink than another lot. But here we know that there were no such ons since the "error" here was allegedly a mistake by respond- Hence there would seem to be no logical basis for respondent ave thought that one transaction was purchased at only 2% ik when the other was purchased at 3% shrink.

addition, it is strange that when Mrs. Manson paid Breckon is for the two lots totalling 131 head on October 13, 1978, the date she invoiced Jennings, her check stub shows the compuns for both the 46-head lot and the 85-head lot calculated at hrink (§ VI(A), immediately above). In other words, when Mrs. son wrote her check to Breckon Farms on October 13, 1978, new that both lots were purchased with 3% shrink, but when nvoiced Jennings on the same day, she allegedly did not know both lots were purchased with 3% shrink.

3. Respondent Did Not Send Jennings a Check for $380.90 for the Alleged Pencil Shrink Error Until July 2, 1980, Almost 1 Year and 9 Months After the Fact, and Over 2 Months After the Complaint Was Filed in this Proceeding.

spondent's check and check stub to Roger Jennings dated July 80, adjusting the invoice in Transaction 8, is set forth on the page (RX 45).

Respondent's Check and Check Stub (RX 45)



GEORGE W. SAYLOR, JR.
LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILL. 62363

7920

70-697
812

July 2 1980

PAY TO THE ORDER OF Geo. W. Saylor 182.96 North Main Street Pittsfield, Illinois 62363

DOLLARS $380.90

GEORGE W. SAYLOR, JR.
LIVESTOCK

NOT NEGOTIABLE

Farmers State Bank
Pittsfield, Illinois 62363

⑆081206373⑆ ⑈40⑈026⑈ 21⑈

GEORGE W. SAYLOR, JR.
PITTSFIELD, ILL.

DELUXE - FORM WVD-2 V-8PL

DATE	HD	KIND	WT	CWT	AMOUNT
7-2-80	1	Mixed heifers			
	#2878	Otalue 13.78	586	@ 65.00	380.90
		Misfigured % on 85 hd			

Respondent's Exhibit #45

Respondent's check for the overcharge to Jennings in Transaction 8 is dated July 2, 1980, about 1 year and 9 months after the transaction, and over 2 months after the complaint was filed on April 22, 1980, in this proceeding. The check is for $380.90, computed on the basis of 586 pounds at $65 per cwt, even though the actual overcharge was on 580 pounds (§ VI(A), *supra*).

Respondent claims that the delay in repaying Jennings for the alleged pencil shrink error occurred because Jennings was advised a day or two after the transaction of the error, and agreed to let it go until respondent sold the next load of fat cattle for him. For the reasons set forth below, that claim is not believable.

The invoice to Jennings dated October 13, 1978, shows on its face that the price to Jennings for the 46 steers (purchased at Breckon Farms) was adjusted from $63 per cwt (JO Ref. 281, p. 246) to $62.50 per cwt (JO Ref. 277, p. 246), resulting in a change in the price charged Jennings for the 46 head from $22,326.57 (JO Ref. 282, p. 246) to $22,149.37 (JO Ref. 278, p. 246), a decrease of $177.20 ($22,326.57 − $22,149.37 = $177.20).

Mrs. Manson testified that on October 13, 1978, or a day or two later, when she discovered that there was a 1% error in the shrink computation, she telephoned Mr. Jennings and advised him of the error. She testified that he said to let the 1% error on the 85 head until the next load, but she claims that Mr. Jennings insisted at the same time on changing the billing error of only 50¢ per cwt on the head, which they both did on their invoices. Mrs. Manson testified (Tr. 162–63, 261–63; see also, Tr. 289–90):

> Q. Then there was one of those lots that was figured at 97 per cent or at a 3 per cent shrink and the other one was figured at 2 per cent shrink?
>
> A. Yes, it was.
>
> Q. Now, can you tell us what happened on that 2 per cent shrink deal?
>
> A. Yes, I can. The next day or later on that day, when I went back—
>
> Whenever I make out a billing and we have a truck loaded, ready to go, you have got the driver standing over you waiting for the billing. I hurried up and made out the billing for Roger Jennings.
>
> Either that day, or the next thing, or the first thing the very next morning, I go through checks that were made out and invoices.

When I did, I noticed that there was an error made there. They were both supposed to be 97 per cent and 98 per cent was charged on one.

Q. Did you call Mr. Jennings in regard to that?

A. Yes, I did.

Q. What happened as a result of that call?

A. I told him that one draft of cattle was figured at the 98 per cent instead of the 93 [97] per cent. He said that that was all right. He said, "The next time you sell a load of fat cattle, we will just take care of it then."

It had went on and I was afraid that I would forget about it, so I issued him a check separately for 586 pounds, which made up for that 1 per cent difference, in the amount of $380.90. I sent it to Roger to get this squared away in the books.

Q. Now, that check is Respondent's Exhibit 45, a copy of that?

A. Yes.

Q. Will you look at your Exhibit 44 [invoice to Jennings] and tell us what happened on that?

A. That was to Roger Jennings for a hundred and eighty-nine head. Well, on the forty-six head, I overcharged him fifty cents.

I was putting on the expense. The price that George had quoted me to bill him already had the expense figured in it.

So I also talked to Roger over the phone. I told him I would change my invoice and he changed his.

Q. And the dollar amount was changed then according to the set of figures that are on there?

A. Right.

* * * * * * *

Q. Would you look, please, at Respondent's Exhibit 44 [invoice to Jennings]. I note that there is a price change from 63 to 62.50 on the 46 head. Is that your handwriting?

A. Yes.

Q. Can you tell us when that change was made from 63 to 62.50?

A. It was made when I called Roger Jennings and informed him about the error in the per cent, which we use a two per cent instead of the three per cent. And, at that time, he told me that I had made an error in the billing, those cattle were sold at 62, and when I looked back onto the work sheet, here, I see that Mr. Saylor had 62.50 and I made an error and put 63 on the invoice.

So, it was corrected with Mr. Jennings over the telephone.

Q. Let me see if I understand correctly. Mr. Jennings informed you that the price per hundredweight was wrong?

A. That is should be for 62.50, and I had put 63 down.

Q. When did this telephone call occur?

A. Just as soon as I noted that I had used the wrong percentage. I would say it was either the next day or within the next day or two. I couldn't pinpoint the exact date or time. It was when I had time to check back through my records and see that there was an error made.

Q. Did Mr. Jennings tell you how he came to learn that the cattle were billed at the wrong price per hundredweight?

A. It was according to the price that him and Mr. Saylor had agreed upon, and it is on his work sheet that he gave me. It was an error by me by putting 63 down instead of charging 62.50.

Judge WEBER: The work sheet is Exhibit 43?

The WITNESS: Yes.

At the outset, Mrs. Manson's testimony that she "hurried up and ıde out the billing for Roger Jennings" because the truck was ›aded, ready to go" (Tr. 162) is contradicted by respondent's at-ney's admission that the livestock involved in Transaction 8 ver came to Pittsfield. This is the one transaction where respond-t's attorney concedes that the livestock did not come to Pittsfield ›spondent's Reply To Complainant's Response To Appeal at 3-4; spondent's Proposed Findings on Remand at 5). Hence there was

no truck "loaded, ready to go," which caused Mrs. Manson to hurr up with the billing to Mr. Jennings.

Moreover, it is incredible that Roger Jennings would have insis ed on making a correction of 50¢ on 46 head (which amounted t $177.20), when, in the same telephone conversation, he allegedl told Mrs. Manson not to bother (until the next load of fat cattl with a correction over twice as large, *i.e.*, 1% on 85 head (whic amounted to $380.90). Mrs. Manson's claim strains credulity to th breaking point.

In addition, any such alleged agreement to correct the matter c the next load of fat cattle was apparently ignored since the allegc correction did not occur until about 1 year and 9 months late which was over 2 months after the complaint was filed in this pr ceeding alleging Transaction 8 as a violation.

Mrs. Manson was relatively free to make any claim she chose make with respect to Mr. Jennings' alleged telephone conversatio since Mr. Jennings had previously testified in the hearing and h been released from his subpoena (Tr. 91). Mr. Jennings only r membered the transaction "[v]aguely," and he did not recall sig ing his affidavit, although he admitted that he "probably did" (T 87).

Specifically, Mr. Jennings was not asked by the attorney f either party as to whether he was advised of the 1% shrink err at the time and agreed to let it go until the next load of fat cattl Complainant's attorney was not in a position to ask the questi since at the time Mr. Jennings testified, complainant's attorney d not know that Mrs. Manson would claim that such a telephone co versation occurred. Respondent's attorney either knew, or shou have known, that Mrs. Manson allegedly had such a telephone co versation with Mr. Jennings. But respondent's attorney asked i question of Mr. Jennings in this respect.

For the foregoing reasons, I find Mrs. Manson's claim that Roger Jennings was advised of the 1% error at the time and agreed to let it go until the next load of fat cattle unbelievable. This is one of the circumstances upon which I rely in drawing the inference that respondent added 10 pounds per head on the 58 head purchased at Kansas City without shrink, resulting in an increase of exactly 580 pounds over respondent's purchase weights.

D. Nine Circumstances Lead Me to Infer that the Weight Increase in Transaction 8 Resulted from Respondent's Pencil Addition of 10 Pounds Per Head on the 58 Head Purchased Without Shrink at Kansas City.

In addition to the six circumstances set forth above, *viz.*:

1. The pencil-shrink-error alibi accounts for 586 pounds, not 580 pounds;

2. Ten pounds per head on the 58-head lot purchased without shrink exactly accounts for the weight increase;

3. Respondent gave no explanation as to why he would have thought that the shrink on the 85-head lot should be computed at 2% when he computed the shrink on the 46-head lot purchased at the same time and place at 3%;

4. Mrs. Manson knew the correct shrink figure to use when *paying* for the 85-head lot on the same day she invoiced Jennings for the lot;

5. Mrs. Manson's claim that Jennings was advised of the shrink error at the time and agreed to let it go until the next load of fat cattle is not believable in view of her admission that Jennings insisted at the same time on a change involving less than half as much money; and

6. Mrs. Manson's check to Jennings allegedly correcting the shrink error was not sent until almost 1 year and 9 months after the fact, over 2 months after the complaint was filed alleging Transaction 8 as a violation;

I rely upon the following three circumstances as the basis for my inference that the weight increase in Transaction 8 resulted from respondent's pencil addition of 10 pounds per head to the 58 head respondent purchased at Kansas City without shrink:

1. None of the worksheets were furnished to complainant's investigators when all of respondent's records were requested on January 29, 1979, which gives rise to the inference that they were not then in existence (see § IX(D), *infra*);

2. The cumulative effect of suspicious circumstances in the 14 transactions (see § XII(G), *infra*); and

3. The ALJ, who saw and heard the witnesses testify, did not believe the testimony of respondent or Mrs. Manson, in part, because of their demeanor at the hearing (see § XII(H), *infra*).

E. Evidence from the Customer Offers No Support for Respondent, and Is Mildly Supportive of Complainant's Position. Truck Driver Evidence Is Irrelevant Since Respondent Admits the Truck Did Not Come to Pittsfield.

Roger Jennings, the customer in Transaction 8, had only a very vague recollection of the transaction at the time he testified (Tr.

87). However, not quite 6 months after the transaction, complainant's investigator, Mr. Gentry, interviewed Mr. Jennings and prepared an affidavit, which Mr. Jennings signed (Tr. 87-89). The affidavit was witnessed by "Joe Reznicek" (CX 17, p. 4). Mr. Jennings' affidavit states (CX 17, p. 5):

> On or about October 13, Saylor purchased 189 steers for us. Most of these cattle were purchased by Saylor from a farm and the rest came from the auction market at Kansas City.
>
> We had these cattle moved direct to the Flint Hills Feedlot [Emporia, Kansas,] and they were weighed in at the lots. The Saylor cattle purchase on the farm in Missouri was purchased with a 3% shrink and Saylor was to transfer this shrink to us. That is we were to pay for the weight which Saylor paid for. The cattle purchased for us at the Kansas City auction by Saylor was to have been turned to us at the same weight for which Saylor paid. [Page 3, the last page of the handwritten affidavit, begins here.] We compared these 189 cattle with cattle we had purchased for us in South Missouri and found them to be shrinking even with the benefit of the 3%, much more than the Missouri cattle.

At the hearing, Mr. Jennings undercut his statement that they found these 189 cattle to be shrinking much more than other cattle purchased for them in South Missouri. He testified (Tr. 88):

> A. This last page here [page 3 of the affidavit], I don't know if that has any direct bearing on it or not. The way it was done is we just get the shrink. I think I remember at the time it was 3 per cent shrink, and he would just pass it on to us. Now, this part here about [the shrink]—you know, that could vary really.
>
> Q. Just a moment——
>
> A. (Interrupting) Page 3, one paragraph in here.
>
> Q. To what are you referring?
>
> A. Well, where it says [we] found them to be shrinking even, with the benefit, much more than the Missouri cattle. Well, we have no way really of telling whether they were—

It is immaterial whether Mr. Jennings' views, in this respect, were more accurately stated in his affidavit or at the hearing since

respondent admits that Mr. Jennings' weight was substantially inflated, allegedly due to respondent's error in computing the shrink. With the admitted "error" in the invoice weight to Jennings, it is not surprising that Jennings stated in his affidavit that he found the shrink to be much higher than other cattle purchased on accurate weight.

However, Mr. Jennings' testimony and affidavit form no part of the basis for my inference that respondent padded the weight in Transaction 8. It is mentioned here only to prevent respondent's attorney from asking his oft-repeated question, "Why does USDA ignore the testimony of respondent's customers?"

F. Respondent Made a Net Profit of $3,289.51, and Cheated Roger Jennings Out of $377.

Based upon the nine circumstances set forth above, I infer that the erroneous weight in Transaction 8 resulted from respondent's pencil addition of 10 pounds per head on the 58 head purchased at Kansas City without pencil shrink. This resulted in Mr. Jennings (who is a Chevrolet dealer—not a farmer (CX 17, p. 5)) paying for 580 pounds too much weight at $65 per cwt (JO Ref. 276, p. 246), or $377 more than he should have paid (5.80 × $65 = $377).

I do not regard respondent's check for $380.90 to Roger Jennings as a mitigating circumstance since the payment was made almost 1 year and 9 months after the fact, and over 2 months after the complaint was filed in this case alleging that respondent added 580 pounds to his purchase weights to Mr. Jennings. In fact, since respondent paid Jennings on the basis of 586 pounds allegedly overcharged, when he only overcharged Jennings for 580 pounds, the check was an additional effort at covering up respondent's fraudulent weight addition of 580 pounds.

This was not one of the transactions where respondent padded the weight so that he could undercut a legitimate dealer. Respondent's net profit in this transaction was $3,289.51. Even without the padded weight, his net profit would have been $2,912.51, or 8.9 times the profit that would have been made by an order buyer charging 25¢ per cwt commission. This is computed in the following table.

Respondent's Expenses and Net Profit in Transaction 8

Expenses

$55,845.93	Purchase Price of 131 Hd (JO Ref. 267, p. 244)
+24,652.65	Purchase Price of 58 Hd (JO Ref. 273, p. 245)
$80,498.58	Purchase Price of 189 Hd
+795.73	Transportation Cost (CX 8, p. 8)
+127.14	Insurance (JO Ref. 285, p. 246)*
$81,421.45	Total Expenses

*This is an expense if it is assumed respondent does not make a profit on his "self insurance."

Net Profit

$84,710.96	Invoice Price to Jennings (JO Ref. 286, p. 246)
−81,421.45	Expenses (from table above)
$3,289.51	Net Profit

Net Profit Without Added Weight

$3,289.51**	Total Net Profit (from table above)
−377.00	Profit from 580 Pounds at $65 Per Cwt
$2,912.51	Net Profit Without Added Weight

**The difference of $4.67 between my calculation and complainant's is due to "rounding" and the use of two different methods.

Legitimate Order Buyer's Net Profit at 25¢ Per Cwt Commission

1,309.12	Weight (cwt) (see § VI(A), *supra*)
×$.25	Commission
$327.28	Commission of Legitimate Order Buyer

Respondent's net profit of $2,912.51 *without the padded weight* is 8.9 times the commission that would have been charged by a legitimate order buyer at 25¢ per cwt ($2,912.51 ÷$327.28 = 8.9). There is nothing unfair about that exorbitant profit. That is free enterprise at its best. However, when respondent made a net profit of $2,912.51 on Transaction 8 without the padded weight, 8.9 times the customary order buyer's profit, it is outrageous that he then made an additional profit of $377 by adding 10 pounds per head to the 58 head purchased at Kansas City without shrink.

It is perhaps not surprising that Roger Jennings is the only customer involved in this case who did not testify that he was satisfied with respondent's livestock transactions.

VII. Arbitrarily Adding Weight by Pencil Is a Blatant Violation of Law. Printing Scale Tickets that Showed More Weight than the Weight of Livestock on the Scale, and Failing to Print Scale Tickets to Document All Weight Figures Needed to Prove a "Transfer of Weights," Would Have Been Such Blatant Violations of Law that Respondent's Claim that He Did So Is Not Believable. Pencil Shrink Is Not Involved in Any of Respondent's Alleged Reweighing Transactions. Complainant's Investigation Was Adequate.

The court states (723 F.2d at 583-84):

> We also find puzzling the finding by the USDA that the weight tickets do not show the actual weight of the cattle but instead reflect a "calculated weight" which includes an allowance for shrinkage of the cattle in transit. This admitted practice of taking a "pencil shrink" is condemned by the USDA as a blatant violation of the Act. However, the USDA also found that the cattle never stood on Saylor's scales. It is unclear to us how the USDA can contend that the cattle were not weighed at Saylor's yard while also arguing that Saylor violated the Act by inaccurately weighing the cattle. Perhaps the USDA means that the "pencil shrink" was just another arbitrary increment added over and above the other additions to the weight. In any event, the USDA's explanation is not clear enough for us to be confident of its precise meaning. Proper judicial review is difficult because of our uncertainty about what facts the USDA actually found.
>
> The questions surrounding the method of accounting for shrinkage in transit present another problem for review. The USDA appears to have concluded, as discussed above, that estimating the shrink factor, as Saylor admittedly did, constitutes a violation of the Act. Saylor claims that estimating and penciling in a shrink factor is a common practice among livestock dealers and is accepted by his customers. Several customers testified at the hearing that they were aware of the practice and approved of it. The USDA has not adequately explained its basis for an apparent blanket condemnation of what may be a widespread and arguably legitimate practice in the trade. The USDA may have good reasons for disapproving of this practice, but, under the circumstances of this case, it must clarify them.

A. Arbitrarily Adding Weight by Pencil Is a Blatant Violation of Law.

As shown in §§ I–V, *supra*, and XIII–XVIII, *infra*, the livestock involved in the alleged reweighing transactions (Transactions 1-7, 9-14) was never sorted, and animals were never substituted or mixed. Respondent merely got out his pocket calculator and added an arbitrary number of pounds to his purchase weights. He then fabricated scale tickets with no livestock on the scale to cover up his fraud.

Similarly, in Transaction 8, respondent's explanation of the "pencil shrink" error is not true. He merely added 10 pounds per head to his 58-head purchase at Kansas City.

It is well settled that arbitrarily adding weight by pencil is an unfair and deceptive practice, in violation of § 312(a) of the Act (7 U.S.C. § 213(a)),[92] which is identical in nature (and results in the same sanction) as false weighing of livestock.[93]

B. The "Universal" Practice of Selling Livestock With Pencil Shrink Is Not Relevant to Any of Respondent's Alleged Reweighing Transactions.

Respondent contends that in the 13 alleged reweighing transactions (Transactions 1–7, 9–14), the livestock bought for his customers was transported to respondent's facilities at Pittsfield, Illinois where some animals were removed and others were added, or various sorting or mixing activities occurred. In his opening brief on remand filed April 2, 1984, at 32–34, respondent attempts to bring his practices in these 13 transactions under the umbrella of the

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[92] § 213. *Prevention of unfair, discriminatory, or deceptive practices*

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

[93] *In re Rubel*, 42 Agric. Dec. 800, 803–06 (1983); *In re Hageman*, 42 Agric. Dec. 531, 541 (1983); *In re Hatcher*, 41 Agric. Dec. 662, 665–66 (1982); *In re MCM Livestock, Inc.*, 39 Agric. Dec. 893, 898, 900 (1980); *In re Collier*, 38 Agric. Dec. 957 (1979); *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Cir. 1980); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829–30 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1668–69 (1978); *In re Burrus*, 36 Agric. Dec. 1668, 1687 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re Loretz*, 36 Agric. Dec. 1087, 1095, 1099 (1977); *In re Fairbank*, 27 Agric. Dec. 1371, 1378–81 (1968), *aff'd*, 429 F.2d 264 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970).

"universal" practice of pencil shrink. Respondent's brief states (*id.*):

> The ALJ held that Saylor was to pass purchase weights on to his customers. Saylor agrees. Saylor was entitled to be paid based on the purchase weights.
>
> When Saylor stopped at Pittsfield, the cattle were somewhat lighter in weight. Saylor would inspect the cattle and determine whether any cattle had to be replaced to satisfy his customers. If so, Saylor then had to determine how he would charge for the purchase weights of the cattle that he had just purchased, less the cattle being sorted out, plus the weights of the replacement cattle. This is a situation which has no perfect solution, since cattle are weighed in groups and not individually.
>
> Saylor would weigh the cattle and figure how much the cattle had shrunk. Then he would prorate that shrink back to the scale weights of the cattle left in that load. Then he would add the replacement cattle. How else would Saylor do this?
>
> Saylor added the shrink back to get back to the purchase weight on the cattle left in the load. Saylor's customers knew of this practice. For example, see testimony at T. 45. Of the 13 customers who gave testimony, none complained about this practice. The USDA had every opportunity to question them about it, but could elicit no complaints.[94]
>
> *It is extremely common for livestock sales to be conducted this way. For example, in his book, Economics of the Livestock-Meat Industry* (Library of Congress No. 64-21166 [1964]), at pages 640-642, *Thomas Stout states that pencil shrink is "universal."* Livestock always shrink in transit. Someone always has to bear the adjustment; either buyer

[94] As shown in § XI, *infra*, no customer testified that he knew that respondent's scale tickets did not accurately reflect the actual weight of the livestock as they were weighed on respondent's scale. Since the customers testified before respondent and his bookkeeper, and complainant's attorney did not know that respondent would claim that he printed scale tickets that did not reflect the actual weight of the livestock being weighed, complainant's attorney could not have questioned them as to their knowledge of that (unlawful) practice. Respondent's attorney, who presumably knew the facts, failed to ask a single customer whether he knew respondent's scale tickets did not reflect the actual weight of the livestock, as weighed by respondent.

or seller. Buyers expect to pay for cattle based on the weight when the animal starts its journey rather than when it ends its journey (unless otherwise agreed).

In these transactions, Saylor merely did what was expected. He charged for the purchase weights. He had to prorate the shrink to figure the purchase weights when part of a load of cattle were replaced. His customers understood that. The increases in total weight in each case was a result of the fact that heavier cattle were added to the load, replacing lighter cattle that were non-uniform or in poor health.

Saylor made notations on the scale tickets in most cases to the effect that cattle had been sorted. This indicated to his customers what had happened.[95]

The USDA may allege that Saylor did not adequately explain the sorting on the documents. Whether or not that is true, it remains that Saylor did not engage in an unfair practice. There is no reason to believe any customer did not know what was happening. Thirteen out of thirteen customers expressed satisfaction. The USDA has not met its burden of proving an unfair practice. [Emphasis added.]

The court also refers in its remand order to respondent's "admitted practice of taking a 'pencil shrink.'" However, the universal practice of pencil shrink has nothing to do with any of the 13 alleged reweighing transactions. It is involved only in Transaction 8 in which respondent admits that the livestock never came to Pittsfield.

The textbook relied on by respondent in the quotation above states (Williams and Stout, *Economics of the Livestock-Meat Industry* 640-41 (1964):

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[95] As shown in the discussion of the individual transactions and in § IX(C), *infra*, respondent made no notations on the scale tickets that were furnished to the Department's investigators, all of which were prepared after Mr. Kostelecky's mid-October 1978 visit to respondent's facilities. Moreover, a notation on a scale ticket that the livestock was sorted is not sufficient notice to an unsuspecting customer that the scale ticket was phony (*i.e.*, that the printed weights did not reflect the weight of the livestock on the scale). In addition, the customer would not know how long the livestock had been kept at respondent's facilities. Respondent admittedly used actual weights instead of calculated weights for livestock kept at Pittsfield for 2 days or more (Tr. 335-36).

Possible New Directions Under P and S

> The 1958 amendment and other factors shifted emphasis of the Packers and Stockyards Division to practices associated with direct marketing as well as those of packers. As a result, such practices as "pencil shrink," consignment selling, grade and weight selling, other forms of rail selling, and contracting have been brought to the attention of the Packers and Stockyards Division for intensive study and investigation. The question has been raised as to why established livestock markets should be prohibited from employing the pencil shrink tactic and other practices which are used almost universally in country selling.

Respondent's textbook refers to the "intensive study and investigation" of pencil shrink that I personally supervised.[96] In studying pencil shrink and other weighing practices and conditions, I had many discussions with farmers, ranchers, dealers, order buyers, commission sellers, stockyard operators and packers throughout the country. As a result of that study, I concluded that pencil shrink is a deceptive practice that should be prohibited. As stated in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* 231 (1981):

> When livestock is sold in direct or country transactions, it is frequently sold with a pencil-shrink, e.g., 4 per cent, which is to approximate the amount of shrinkage the livestock will incur in its movement to the packing plant or other destination. This is deceptive since with a 4 per cent shrink the price is actually based on 15⅓ ounces rather than on 16 ounces. Although the livestock may well shrink 4 per cent after purchase, livestock purchased at a public market similarly shrinks after purchase, but such shrinkage is taken into account at a public market by the price paid per pound rather than by reducing the weight.
>
> Some sellers do not recognize that 4 per cent off the weight is the same as 4 per cent off the price. Thus selling with pencil-shrink gives sellers the impression that they are receiving an inflated price per pound for their livestock. Although deceptive, this custom is so ingrained in

[96] I was Director of the Packers and Stockyards Division from December 1962 until it became the Packers and Stockyards Administration in 1968. From 1968 through January 1971, I was Administrator of the Packers and Stockyards Administration.

the livestock industry that it will probably continue.[259]

[259] When the author was administrator of the Packers and Stockyards Administration, he attempted to gain producer support for a regulation to prohibit pencil-shrink, but the producers strongly favored the system. Since they can quote a higher selling price for their livestock to their friends and neighbors, they like this deception. An earlier attempt to have pencil-shrink held unlawful by the [Department's first] judicial officer was also unsuccessful. *In re Capitol Packing Co.*, 22 Agric. Dec. 651, 688-90, *reconsideration denied*, 22 Agric. Dec. 1234, 1243-44 (1963), *aff'd and rev'd in part on other grounds*, 350 F.2d 67 (10th Cir. 1965).

The figure of 15⅓ ounces referred to in the first paragraph of the proceeding quotation is obtained by multiplying .96 × 16 ounces, which equals 15⅓ ounces. Since a person buying livestock with a 4% shrink knows that he is only paying for 96% of each pound, *i.e.*, 15⅓ ounces, he is able to pay a little more per pound (or, more accurately, per cwt) than a person buying without pencil shrink. That makes the seller think that he is getting more than his neighbor who sold without pencil shrink at a slightly lower price.

To illustrate the practice of pencil shrink, if a 1,000-pound steer is sold with 3% pencil shrink, the steer is weighed and a scale ticket is printed showing 1,000 pounds. Either on the scale ticket or the invoice, or both, a pencil notation is made showing 1,000 × .97 = 970, which explains that the buyer is only paying for 970 pounds. (Or the notation could show 1,000 − 30 = 970.)

There is no reweighing involved in a pencil shrink transaction. The determination is arbitrarily made at the time of the original weighing (on the basis of *expected* shrink) that the buyer will pay for only a portion of the original scale weight, *e.g.*, 97% in the case of a 3% shrink agreement.

Where a dealer (such as respondent) buys livestock with pencil shrink, and sells the livestock to the buyer on the basis of his purchase weights, as in Transaction 8, the dealer is required to pass on to his customer the exact amount of pencil shrink he obtained in his original purchase. *In re Collier*, 38 Agric. Dec. 957, 967-68 (1979), *aff'd per curiam* (unpublished), 624 F.2d 190 (9th Circ. 1980).

In this case, respondent's reliance on the universal custom of pencil shrink, in support of his activities involved in the 13 alleged reweighing transactions, is totally misplaced.

C. Printing Scale Tickets that Did Not Reflect the Actual Weight of Livestock on the Scale, and Failing to Print All Scale Tickets Required to Support Invoice Weights, Would Have Been Such Blatant Violations of the Act and Regulations that Respondent's Claim that He Did So Is Not Believable. Complainant's Investigation Was Adequate.

1. Lawful Method of Transferring Weights with Substituted Animals.

At the outset, it should be noted that if respondent sorted and substituted animals at Pittsfield, Illinois, as he contends, he could have handled the transactions in a lawful manner, while still making his customers bear the shrink loss. As explained below (§ VII(C)(3), (4)), to do that, respondent would have been required in each transaction to:

(1) Have a record of his original purchase weight;

(2) Actually weigh the livestock and print scale tickets for the Pittsfield "in-weight" (*i.e.*, arrival weight);

(3) Calculate the shrink per head of the animals originally purchased;

(4) Actually weigh and print a scale ticket for the animals removed;

(5) Subtract the weight of the animals removed (as increased by their pro rata portion of the shrink, *e.g.*, 28 pounds per head) from the original purchase weight;

(6) Actually weigh and print a scale ticket for the substituted animals;

(7) Invoice the buyer for the weight calculated by subtracting (i) the weight of the animals removed (as increased by their pro rata shrink) from (ii) respondent's original purchase weight; and then adding the actual weight of the animals substituted; and

(8) Refrain from printing phony scale tickets that show more weight than is on the scale at the time.

If respondent had done that, and made appropriate explanations on the buyers' invoices, the transactions would have been lawful, assuming that respondent actually engaged in sorting and substituting animals, as he claims.

2. Respondent's Claimed Method of Printing, and Not Printing, Scale Tickets.

Respondent and his bookkeeper, Mrs. Manson, testified that with respect to most of the alleged reweighing transactions involved

here,[97] the Pittsfield "in-weight" (or arrival weight) was determined by respondent's yardman (who was not named or called as witness—more on this later!), who did not print a scale ticket, but rather, wrote the Pittsfield in-weight on a sheet of paper, which was given to respondent. Specifically, respondent testified (Tr. 312-13):

> A. I generally try to talk to the boy there at home. I also have a phone there at the yards where he can get ahold of me immediately. And, if we have a lot of sorting and like that, we may do part of it the night before and we may do part of it at 4:00 o'clock the next morning; it just all depends on when you arrive home and how much you are able to stay up and do.
>
> Q. What is your practice as far as weighing cattle is concerned as soon as you get them back to Pittsfield?
>
> A. Generally, what trucks is arriving home ahead of me, the boy there at the year [yard], our yardman, whatever time the truck gets in, they call him at his home and he comes out and checks the cattle—counts the cattle—and checks them down the chute and checks them, of course, the scales, to be sure that everything is all there and writes it down on a sheet of paper as to what they come in at.
>
> If I happen to be there, he and I both are, then, when they come in, sometimes we will take them right down the alley and I'll cut off, you know, what I think. It depends on who I'm going to and what I want to do. And then we will bring them back to the scales and check our transit shrink and like that.
>
> But the bulk of the time, he will have them penned and lotted and the off-truck weights for me all ahead of time.
>
> Q. Now, you don't make scale tickets on those weights at all when they come in, do you?
>
> A. No, not at all.
>
> Q. That's for your own records you write those down?

[97] Differences in a few transactions are explained in the discussion of the individual transactions.

A. We just write it on a sheet of paper and he puts it on my desk.

Respondent claims that he calculated the shrink per head (*e.g.*, 28 pounds per head) and wrote the result on a scrap of paper (worksheet). Respondent claims that some animals were sorted out, but admits that no scale tickets were printed showing the weight of the animals sorted out. Instead, their weight and pro rata shrink were written on the scrap of paper (worksheet). Respondent claims that other animals were added from his inventory, but that scale tickets were not printed for the animals added.[98] However, respondent claims that the actual weight of the animals added was written on the scrap of paper (worksheet). Respondent claims that the buyer was invoiced for the original purchase weight, *e.g.*, at Kansas City, less the weight of the animals removed (increased by their pro rata shrink), plus the actual weight of the animals added from respondent's inventory (see, *e.g.*, Tr. 132–34, 226–33, 265–66, 312–19).

Respondent or one of his employees would print scale tickets adding up the total amount of weight invoiced to the buyer,[99] even though the livestock had shrunk in transit and the buyer was suffering the loss of the shrink. Respondent and his bookkeeper, Mrs. Manson, testified that the scale tickets would be printed by (i) placing livestock on the scale and weighing them, *e.g.*, 25 at a time, (ii) calculating with a pocket calculator their pro rata shrink, *e.g.*, 28 $\times$25, or 700 pounds, (iii) moving the scale poise over so that it recorded the weight of the animals as increased by their pro rata shrink, and (iv) pressing the scale lever to stamp on the scale tickets a weight figure which included their pro rata shrink. Specifically, respondent testified on direct examination (the day after his bookkeeper had testified) (Tr. 317–19, 358):

Q. Now, that was made at the time this was done, is that right, this [Respondent's] Exhibit 7-A [worksheet for Transaction 2] was made at the time you were sorting these steers?

A. Right.

Q. And you actually ran these animals across the scale and you sorted them and recorded the scale weights on them?

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[98] Differences in a few transactions are explained in the discussion of the individual transactions.

[99] Differences in a few transactions are explained in the discussion of the individual transactions.

A. Yes, sir. When we would have went across the scales whatever head count that we used in this transaction would have had shrink added back to them, per head count, for the number of head that we used out of this transaction.

Q. Now, would you explain what you mean by that?

A. Well, in other words, in this case here, I believe, if I recall, we used 54 steers and—I'll have to refer—28 pounds a head. So, in other words, out of these scale tickets there would be 54 times 28 would be added back. Just a minute here and I can tell you.

In other words, if you weigh 25 at a draft, that would be 25 times 28 to the nearest five pounds that would be added back with a little pocket calculator, just like I used here, at the scales.

Q. Then the way you do that manually you would put 25 head on and weigh the 25 head on the scale and then you would add 28 pounds a head?

A. I would see whatever that turns out to be. I don't have the figure in my mind here, but then we would move the scale and stamp it to what it is supposed to be.

Q. You would move the scale over and stamp it?

A. Yes.

* * * * * * *

[CROSS EXAMINATION]

Q. Mr. Saylor, can a livestock scale like the one you have got be used to stamp sale [scale] tickets when there are not any livestock on the scale?

A. They most certainly could, yes, sir.

Q. Have you ever done that?

A. No, sir.

Q. But you have stamped out tickets that show weights that are not the actual weight of the cattle on the scale at that time?

A. Yes, sir, as we weigh the cattle, we take the calculator and determine the amount of shrink for the number of

ead of cattle that are of that lot that are on the scale
nd then move the scales to get what we are going t
harge the customer.

ilarly, respondent's bookkeeper testified the day befor
examination (Tr. 265-66):

Q. Mrs. Manson, I represent to you that Respondent'
xhibit 49 [scale ticket for Transaction 9] shows a scal
cket with three graphs [drafts] totalling 39,395. Do yo
gree with me that that equals the billing weight as mani
sted in Respondent's Exhibit 51?

A. Yes.

Q. And, that, looking at the work sheet, it appears th
at printed scale ticket includes 2,350 pounds of shrink

A. Yes.

Q. That would mean that the cattle that were on th
cale when that ticket was stamped out actually didn
eight 39,395 pounds, wouldn't it?

A. The cattle on the scale were weighed with the shrin
dded on per head per draft.

Q. My question was, from what we have before us, wi
ou agree with me that we must conclude that when tho
ttle were on the scale they weighed 2,350 pounds le
an the stamped weight? Their actual weight was le
an the stamped weight?

A. The weight was before the shrink was added
hem.[100]

espondent had sorted and substituted animals as he
ctions 3 and 4, immediately following, show that his c
od of printing scale tickets that included "shrink," a
ed failure to print all the scale tickets required to supp

Previously, on direct examination, respondent's bookkeeper testifie
least deceptively) thnt the scale ticket for Transaction 2 (RX 6) was t
s which were actually shipped to Mr. Long" (Tr. 145), when they ac
1,525 pounds of shrink (see § V(A), *supra*). Although Mrs. Manson te
examination that "when we sort the cattle for the load we reweigh
en the transit shrink is pro-rated back on the cattle" (Tr. 133), res
d of printing scale tickets with added shrink was not made und
er cross-examination.

weight invoiced to his customers, would have been such bla[illegible] lations of law that his claims are not believable.

3. Printing Scale Tickets that Included "Shrink" Would Have Been Such an Outrageous Violation of Law that Respondent's Claim that He Did So Is Not Believable.

Printing scale tickets that do not reflect the actual weig[illegible] livestock on the scale at the time the scale ticket is pri[illegible] printing phony scale tickets, is squarely contrary to the [illegible] tions for weighing livestock. The instructions clearly sta[illegible] should be obvious to anyone involved in operating any ty[illegible] with a printing device) that the weight "shall be recorded [illegible] ately after the load balance is obtained and before any [illegible] moved" (9 CFR § 201.73-1(c)(1)). Furthermore, the instructi[illegible] that the "weight printing device on a scale shall be operat[illegible] to produce a printed or impressed record of the weight val[illegible] the livestock load is on the scale and correctly balanced" [illegible] § 201.73-1(c)(2)).[101]

There is nothing in the record to indicate that there is any [illegible] practice or custom contrary to the foregoing instructions, [illegible] volving the moving of the scale poise (after the load balance [illegible] tained, and before the scale ticket is printed) so that the pri[illegible] weight records something other than the actual weight of the [illegible] stock on the scale. Respondent cites no textbook indicating [illegible] any professor or livestock expert has ever heard of anyone pri[illegible] scale tickets in the manner in which respondent admits (or [illegible] claims) that he printed the scale tickets. None of the farmers [illegible] testified in this case were asked if they knew of this practice [illegible] respondent (see note 94, *supra*). And in my 35 years with the [illegible] partment, much of which has been devoted to Packers and S[illegible] yards Act activities,[102] I have never heard of anyone printi[illegible]

[101] In addition, 9 CFR § 201.55 requires that weight figures on inv[illegible] "actual weights" (at the place and time of the consummation of the tra[illegible] unless some other date or time is specified) (see § VII(C)(4), immediately fo[illegible]

[102] From October 1950 through June of 1961, I participated in the briefing a[illegible] arguing of every case in the United States Courts of Appeals involving appeals [illegible] the decisions of the prior Judicial Officer, which included false weighing [illegible] From December of 1962 through January of 1971, I was Director of The Packers [illegible] Stockyards Division and (when it was made an Administration) Administrator [illegible] The Packers and Stockyards Administration. Since June of 1972, I have [illegible] every case under The Packers and Stockyards Act that has been appealed to [illegible] Secretary, except one (in which I disqualified myself because I had participated [illegible] the case, while Administrator).

scale ticket in the manner referred to by respondent except in cases involving false weights.[103]

For example, in *Cella* v. *United States*, 208 F.2d 783, 786-87 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights in which I participated in the briefing and oral argument, the court described the exact method respondent says he used to print scale tickets:

> The weighmaster determines the weight of the draft of cattle by moving the main poise along the weighbeam and adjusting the fractional poise until the needle of the over-under indicator is in the center of the indicator target, and the weighbeam is balanced. He then inserts the scale ticket into the slot of the printing mechanism which is a part of the poise assembly, and, pressing a hand lever, thus records the weight of the cattle on the scale ticket. The correct weight appears on the scale ticket only if the weighbeam is properly balanced and providing the ticket is printed without moving any part of the poise assembly. However, any desired weight could be impressed on the scale ticket merely by moving the poise assembly to the desired position prior to pressing the handle of the printing device. The weight printed on the scale ticket determines the price which the buyer pays to the seller.
>
> The five weighmasters testified that in order to overweigh petitioner's cattle, they first properly balanced the weighbeam and then moved the poise assembly to add weight before pressing the lever of the printing device.

Although it is easy to see from the scale instructions quoted above (9 CFR § 201.73-1(c)(1)-(2)) that respondent's method of printing scale tickets showing a greater weight than the actual weight of the livestock at the time they are being weighed is a violation of the instructions (and a deceptive and unfair practice in violation of the Act (7 U.S.C § 213(a)), the enormity of the violation can only be seen by reading the quoted instructions in their context. The instructions are so detailed that a weigher cannot leave the scale to take a 5-minute break without having to follow a prescribed procedure on his return. Specifically, the instructions state (9 CFR § 201.73-1) (emphasis added):

§ 201.73-1 *Instructions for weighing livestock.*

[103] If I had heard of such a trade practice, I would have given respondent the benefit of that knowledge, even though it was not in the record.

Stockyard operators, market agencies, *dealers*, and packers *who operate scales on which livestock is weighed in purchase or sales transactions are responsible for the accurate weighing of such livestock. They shall supply copies of the instructions in this section to all persons who perform weighing operations for them and direct such persons to familiarize themselves with the instructions and to comply with them at all times.* This section shall also apply to any additional weighers who are employed at any time. *Weighers must acknowledge their receipt of these instructions and agree to comply with them, by signing in duplicate, P&SA Form 215* [1] *provided by the Packers and Stockyards Administration.* (A facsimile copy of this form appears at the end of this section.) One copy of the form is to be filed with an area office of the Packers and Stockyards Administration and the other retained by the agency employing the weighers.

[1] Form filed as part of original document.

(a) *Balancing the empty scale.* (1) The empty scale shall be balanced each day before weighing begins, and maintained in correct balance which [while] weighing operations continue. The zero balance shall be verified at intervals of not more than 15 drafts or 15 minutes, whichever is completed first. *In addition, the zero balance of the scale shall be verified whenever a weigher resumes weighing duties after an absence from the scale* and also whenever a load exceeding half the scale capacity or 10,000 pounds (whichever is less) has been weighed and is followed by a load of less than 1,000 pounds, verification to occur before the weighing of the load of less than 1,000 pounds.

(2) The time at which the empty scale is balanced or its zero balance verified shall be recorded on scale tickets or other permanent records. Balance tickets must be filed with other scale tickets issued on that date.

(3) Before balancing the empty scale, the weigher shall assure himself that the scale gates are closed and that no persons or animals are on the scale platform or in contact with the stock rack, gates, or platform. If the scale is balanced with persons on the scale platform, the zero balance shall be verified whenever there is a change in such persons. When the scale is properly balanced and ready for weighing, the weigher shall so indicate by an appropriate signal.

(4) Weighbeam scales shall be balanced by first seating each poise securely in its zero notch and then moving the balance ball to such position that a correct zero balance is obtained. A scale equipped with a balance indicator is correctly balanced when the pointer comes to rest at zero. A scale not equipped with a balance indicator is correctly balanced if the weighbeam, when released at the top or bottom of the trig loop, swings freely in the trig loop in such manner that it will come to rest at the center of the trig loop.

(5) Dial scales shall be balanced by releasing all drop weights and operating the balance ball or other balancing device to obtain a correct zero balance. The indicator must visually indicate zero on the dial and the ticket printer must record a correct zero balance.

(6) Electronic digital scales should be properly warmed up before use. In most cases, it is advisable to leave the electric power on continuously. The zero load balance shall be verified by recording the zero balance on a scale ticket. The main indicating element and the remote visual weight display shall indicate zero when the balance is verified. The proper procedure for balancing this type of scale will vary according to the manufacturer. Refer to the operator's manual for specific instructions.

(b) *Weighing the load.* (1) Before weighing a draft of livestock, the weigher shall assure himself that the entire draft is on the scale platform with the gates closed and that no persons or animals off the scale are in contact with the platform, gates, or stock rack.

(i) *On a weighbeam scale with a balance indicator, the weight of a draft shall be determined by seating the poises at such positions that the pointer will come to rest within the central target area or within ¼ (0.25) inch of the zero mark.*

(ii) *On a weighbeam scale without a balance indicator, the weight shall be determined by seating the poises at such positions that the weighbeam, when released from the top or bottom of the trig loop, will swing freely and come to rest at the approximate center of the trig loop.*

(iii) On a dial scale, the weight is indicated automatically when the indicator moves around the dial face and comes to rest.

(iv) On an electronic digital scale, the weight of a draft is indicated automatically when the weight value indicated stabilizes.

(2) *The correct weight of a livestock draft is the value in pounds indicated when a correct load balance is obtained.* The weigher should always concentrate his attention upon the beam tip, balance indicator or dial indicator while weighing and not concern himself with reading the visible weight indications until correct load balance is obtained. On electronic digital scales, the weigher should concentrate on the pulsing or flickering of weight values to assure that the unit indicates a stable weight before activating the print button.

(c) *Recording the weight.* (1) *The weight of each draft shall be recorded immediately after the load balance is obtained and before any poises are moved or the load is removed from the scale platform. The weigher shall make certain that the printed weight record agrees with the weight value visually indicated when correct load balance is obtained.* He shall also assure himself that the printed weight value is distinct and legible.

(2) *The weight printing device on a scale shall be operated only to produce a printed or impressed record of the weight value while the livestock load is on the scale and correctly balanced.* If the weight value is not printed clearly and correctly, the ticket shall be marked void and a new one printed before the livestock is removed from the scale.

(d) *Scale tickets.* (1) *Scale tickets used to record the weight values of livestock in purchase or sales transactions shall be used, at any given scale, in the order of their consecutive serial numbers unless otherwise marked to show the order of their use.* All tickets shall show the date of the weighing and the name or initials of the weigher performing the weighing service.

(2) *No scale tickets shall be destroyed or otherwise disposed of because they are soiled, damaged, incorrectly executed, or voided.* They shall be preserved and filed to comprise a complete serial number sequence.

(3) No scale ticket shall be used to record the weight of a livestock draft for "catch-weight," inventory, transportation charge or other nonsale purposes unless the ticket is clearly marked to show why the weight was determined.

(4) When weight values are recorded by means of automatic recording equipment directly on the accounts of sale or other basic records, such record may serve in lieu of a scale ticket.

(e) *Weigher's responsibilities.* (1) The primary responsibility of a weigher is to determine and accurately record the weight of livestock drafts without prejudice or favor to any person or agency and without regard for livestock ownership, price, condition, fill, shrink, or other considerations. A weigher shall not permit the representations or attitudes of any persons or agencies to influence his judgment or action in performing his duties.

(2) Unused scale tickets, or those which are partially executed but without a printed weight value, shall not be left exposed or accessible to unauthorized personnel. All such tickets shall be kept under lock when the weigher is not at his duty station.

(3) *Accurate weighing and correct weight recording require that a weigher shall not permit his operations to be hurried to the extent that inaccurate weights or incorrect weight records may result. Each draft of livestock must be weighed accurately to the nearest minimum weight value that can be indicated or recorded.* Manual operations connected with balancing, weighing, and recording shall be performed with the care necessary to prevent damage to the accurately machined and adjusted parts of weigh-beams, poises, and printing devices.

(4) Livestock owners, buyers, or others having legitimate interest in a livestock draft must be permitted to observe the balancing, weighing, and recording procedures, and a weigher shall not deny them that right or withhold from them any information pertaining to the weight of that draft. He shall check the zero balance of the scale or reweigh a draft of livestock when requested by such parties.

(f) *Sensitivity control.* (1) A scale must be sensitive in response to platform loading if it is to yield accurate weights. It, therefore, is the duty of a weigher to assure

himself that interferences, weighbeam friction, or other factors do not impair sensitivity. He should satisfy himself, at least twice each day, that the scale is sufficiently sensitive, and if the following requirements are not met, he should report the facts to his superior or employer immediately.

(2) A weighbeam scale with a balance indicator is sufficiently sensitive if, when the scale is balanced with the pointer at the center of the target, movement of the fractional poise one graduation will change the indicator rest point ¼ inch (0.25) or the width of the central target area, whichever is greater.

(3) A weighbeam scale without a balance indicator is sufficiently sensitive if, when the scale is balanced with the weighbeam at the center of the trig loop, movement of the fractional poise two graduations will cause the weighbeam to come to rest at the bottom of the trig loop.

(4) Adjustable damping devices are incorporated in balance indicators and in dial scales to absorb the effects of load impact and assist in bringing the indicator to rest. The weigher should be familiar with the location and adjustment of these damping devices and should keep them adjusted so that the pointer will oscillate freely through at least one complete cycle of movement before coming to rest at its original position.

(5) Friction at weighbeam bearings may reduce the sensitivity of the scale, cause sluggish weighbeam action and affect weighing accuracy. A weigher should inspect the weighbeam assembly daily to make certain that there is clearance between the weighbeam and the pivot bearings.

(6) Interferences or binding of the scale platform, stock rack, gates or other "live" parts of the scale are common causes of weighing inaccuracy. A weigher should satisfy himself, at the beginning of each weighing period, that all such "live" parts have sufficient clearance to prevent interferences.

(g) *General precautions.* (1) The poises of weighbeam scales are carefully adjusted and sealed to a definite weight at the factory and any change in that weight seriously affects weighing accuracy. A weigher, therefore, should be certain that poise parts do not become broken,

loose or lost and that no material is added to a poise. Balancing or weighing shall not be performed while a scale ticket is in the slot of a weighbeam poise.

(2) Stops are provided on scale weighbeams to prevent movement of poises back of the zero graduation when balancing or weighing. When the stops become worn or broken and allow a poise to be set behind the zero position, this condition should be reported and corrected without delay.

(3) Foreign objects or loose material in the form of nuts, bolts, washers or other material on any part of the weighbeam assembly, including the counter-balance hanger or counter-balance weights, are potential sources of weighing error. Loose balancing material must be enclosed in the shot cup of the counter-balance hanger, and counter-balance weights must not be of the slotted type which can readily be removed.

(4) Whenever for any reason a weigher has reason to believe that a scale is not functioning properly or not yielding correct weight values, he shall discontinue weighing, report the facts to the parties responsible for scale maintenance, and request inspection, test, or repair of the scale.

(5) When a scale has been adjusted, modified, or repaired in any manner which may affect the accuracy of weighing or weight recording, the weigher shall not use the scale until it has been tested and inspected and found to be accurate.

(6) Count-off men, gate men, or others assigned to open or close scale gates or to drive livestock on or off the scale, shall perform those functions as directed by the weigher's signals or spoken instructions. They shall prevent persons or animals off the scale from being in contact with any part of the scale platform, stock rack, or gates while the scale is being balanced or used for weighing. They shall not open gates or remove livestock from the scale until directed by the weigher.

Reading the specific instructions relevant here in the light of their context shows that respondent's claimed method of printing scale tickets showing more weight than the actual weight of livestock then on the scales would have been an outrageous violation of law—such an outrageous violation of law that I do not believe

his testimony in this respect. I infer that he "admitted" to engaging in such an outrageous violation of law to cover up a greater violation, *i.e.*, weight padding. My inference here is supported by the ALJ's conclusion that respondent and Mrs. Manson were not credible witnesses (see § XII(H), *infra*).

The recording of accurate weights on scale tickets is of such vital importance to the livestock industry that the Packers and Stockyards Administration does not trust scale operators to write the weight of livestock on scale tickets. All scales must have a printing device so that the weight will be mechanically printed on the scale ticket. Specifically, the regulations provide (9 CFR § 201.71 (1979)):

> § 201.71 *Accurate weights.*
>
> Each stockyard owner, market agency, dealer, or licensee who weighs livestock or live poultry shall install, maintain, and operate the scales used for such weighing so as to insure accurate weights. All livestock scales shall be equipped with a type-registering weighbeam, a dial with a mechanical ticket printer, or a similar device which shall be used for printing or stamping the weight values on scale tickets.

This requirement also serves to emphasize the outrageous nature of respondent's claimed method of printing scale tickets, as do other requirements and programs of the Packers and Stockyards Administration to foster the integrity of livestock scale tickets.

For example, livestock scales must be tested "at suitable intervals" (9 CFR § 201.72), which is defined as "a period of approximately 6 months" (9 CFR § 201.72-1(b)(3)). In addition, the Department conducts different types of investigations, *e.g.*, the one involved in the present case, to detect false weighing or weight padding. In view of all the programs and requirements designed to insure the integrity of livestock scale tickets, respondent's claimed practice of printing scale tickets that did not reflect the actual weight of the animals being weighed would have been such an outrageous violation of law that his claim is not believable.

In addition to being an unfair and deceptive practice, the printing of phony scale tickets creates false records which make it much more difficult for the Packers and Stockyards Administration to detect violations. This is a further, serious aspect of respondent's violations. Section 401 of the Act provides (7 U.S.C. § 221):

> § 221. *Accounts and records of business; punishment for failure to keep*

> Every packer or any live poultry dealer or handler, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

The serious nature of recordkeeping violations was stated in *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1734 (1978), as follows:

> Respondent's recordkeeping violations, which are intertwined with respondent's accounting violations, are also serious violations of the Act inasmuch as accurate records are essential to effective enforcement of a Federal regulatory program. See, *e.g.*, *United States* v. *Ruzicka*, 329 U.S. 287, 288–289; *United States* v. *Darby*, 312 U.S. 100, 124–125; *Electric Bond Co.* v. *Comm'n.*, 303 U.S. 419, 439; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, 204–216; *Baltimore & Ohio RR.* v. *Interstate Com.*, 221 U.S. 612, 620–623; *Hyatt* v. *United States*, 276 F.2d 308, 312 (C.A. 10); *Panno* v. *United States*, 203 F.2d 504, 510 (C.A. 9); *United States* v. *Turner Dairy Co.*, 166 F.2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; *United States* v. *Turner Dairy Co.*, 162 F.2d 425, 425–428 (C.A. 7), certiorari denied, 332 U.S. 836; *Bartlett Frazier Co.* v. *Hyde*, 65 F.2d 350 (C.A. 7), certiorari denied, 290 U.S. 654; *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1529 (1977).

I infer that respondent knew that he was supposed to print only actual weights on scale tickets and add prorated shrink in handwriting since his scale tickets purport to do that in Transactions 4 and 6 (see §§ I(B) and IV(B), *supra*). For example, in Transaction 4, his scale ticket includes a handwritten figure of 955 pounds of prorated shrink (JO Ref. 70, p. 32), and shows the supporting figures, *i.e.*, "33–29# Per Hd" (JO Ref. 69, 71, p. 32) (33 ×29 = 957, which rounds to 955). In Transaction 6, his scale ticket shows a handwritten figure of 400 pounds of prorated shrink (JO Ref. 226, 227, p.

199), and shows the supporting figures, *i.e.*, "16 hd Springfield 4-25# Per Hd" (JO Ref. 225, p. 199).

That would indicate clearly that respondent knew how he should show prorated shrink, as distinguished from actual weight, on scale tickets.[104] Since many of the other transactions were allegedly similar in nature to these two (*i.e.*, Transactions 1, 2, 9, 10, 11, and 13), I infer that respondent's failure to similarly show the amount of prorated shrink in handwriting on the scale tickets (or on the invoices) was to deceive the buyers.

The administrative complaint in this case would have been adequate to impose a sanction for respondent's admitted (*i.e.*, claimed) printing of phony scale tickets, even if the weight-padding charges were not proven. The complaint alleges:

II

> Respondent, on or about the dates and in the transactions set forth below and in divers other transactions, purchased cattle for and sold cattle to certain customers, purportedly on the basis of the same weights at which respondent purchased the cattle, but in fact respondent billed and collected from such customers on the basis of false and incorrect weights obtained by adding an arbitrary number of pounds to the weights at which the cattle were originally purchased. *Copies of the invoices and other documents showing such false weights were made a part of the accounts and records of respondent.*
>
> * * * * * * *
>
> By reason of the facts alleged in paragraph II above, respondent has willfully violated sections 312(a) and 401 of the Act (7 U.S.C. 213(a) and 221) and section 201.55 of the regulations (9 CFR 201.55). [Emphasis added.]

Even if the weight-padding allegations were not proven, the "other documents" referred to in the complaint (*i.e.*, including scale tickets) would still have shown false weights, as alleged, but for a different reason than complainant believed when writing the allegations of paragraph II. This would have been sufficient to impose a sanction even if the false scale tickets had been created for a different reason than complainant specifically alleged.

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[104] As discussed in §§ I(B) and IV(B), *supra*, however, the 400 pounds and 955 pounds written on these scale tickets both understate the actual prorated shrink, and the printed figures both overstate the actual weight (assuming, erroneously, that respondent actually sorted the livestock, as claimed).

It is well settled that the formalities and technicalities of court pleading are not applicable in administrative proceedings.[104A] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisifies due process in the absence of a showing that some party was misled.[105]

Here, the complaint specifically identifies the 14 transactions at issue, and complainant introduced all of respondent's scale tickets which it had been furnished relating to these transactions. Moreover, respondent introduced the scale tickets for all the transactions. Hence respondent knew exactly which scale tickets were at issue, and he knew that they were alleged to be false. It would have been immaterial, therefore, if the proof had shown that they were false for a different reason than that specifically alleged. (But, in any event, however, the weight-padding violations are proven here beyond the shadow of a reasonable doubt.)

4. Failing to Print All Scale Tickets Required to Support Invoice Weights Would Have Been Such an Outrageous Violation of Law that Respondent's Claim that He Did so Is Not Believable.

Livestock is sold (i) on a weight basis, (ii) on a per-head basis, or (iii) on the basis of the carcass grade and/or weight of slaughter livestock.[106] Respondent sold livestock on a weight basis. He

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[104A] *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940).

[105] *NLRB* v. *Mackey Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *NLRB* v. *Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1 19 (7th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc.* v. *USDA*, 438 F.2d 1332 1342 (8th Cir. 1971); *Swift & Co.* v. *United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella* v. *United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n.* v. *NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union* v. *NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co.* v. *FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co.* v. *FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co.* v. *FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB* v. *Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173-74, (1976).

[106] Separate regulations govern the weighing of livestock sold on a carcass grade and/or weight basis. 9 CFR § 201.99(d). This regulation, and some of the others mentioned in this subsection, were amended in minor respects (not affecting the discussion in this subsection) after the transactions at issue here. The latest amendments are at 49 Fed. Reg. 37,371, 37,374-75 (1984).

showed the weight on his invoices to his customers. Respondent claims that he invoiced his customers on the basis of his purchase weights, as adjusted for sorting, substituting, or mixing.

The regulations provide that if you sell on a weight basis, you must have scale tickets to support your invoice weight. Specifically the regulations provide (9 CFR § 201.55) (1979)):

> § 201.55 *Purchases and sales to be made on actual weights.*
>
> *When livestock* or live poultry *is* bought or *sold on a weight basis* in transactions subject to the provisions of the act, *settlement* therefor *shall be on the basis of the weight shown on the scale ticket[s]* or correction ticket[s], as the case may be. *Any weight figures shown on accounts of sale,* accounts of purchase, invoices, bills, or statements issued in connection with transactions subject to the act *shall be actual weights obtained on scales operated or used by* stockyard owners, market agencies, *dealers,* or packers, in the case of livestock, or on scales operated by licensees, in the case of live poultry, *at the place and at the time of the consummation of the transactions in question* or, if not, shall be appropriately explained on the accountings, bills, or statements issued. [Emphasis added.]

The "[s]" is added to "ticket" in the first sentence because, as applied to the facts here, more than one scale ticket would be required to prove a transfer of weights where animals are sorted, substituted or mixed. The regulations contain the familiar principle of statutory construction (9 CFR § 201.1):

> § 201.1 *Meaning of words.*
>
> Words used in this part in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

Note that the first sentence of 9 CFR § 201.55 quoted above does not require that settlement be on the exact amount of "weight shown on the scale ticket[s]," but, rather, on the *basis* of the "weight shown on the scale ticket[s]." Accordingly, substituting animals and prorating shrink is permissible, so long as the settlement is supported by the scale tickets. However, the regulation plainly and emphatically requires that there be a scale ticket or tickets to support any settlement for livestock sold on a weight basis.

Note, also, that the second sentence of 9 CFR § 201.55 quoted above states that weight figures must be "actual weights" obtained at the place and time of the consummation of the transactions (Pittsfield, Illinois, as contended by respondent), unless otherwise appropriately explained on the invoices. Respondent's invoices had no explanations to the contrary.

Slight modifications to 9 CFR § 201.55 were made in 1979 (44 Fed. Reg. 45,361 (1979)), and the section was rewritten in 1984 to "clarify the language in the existing regulation" (49 Fed. Reg. 6080, 6082 (1984)). The present section provides (*id.* at 6084):

> § 201.55 *Purchases and sales to be made on actual weights.*
>
> When livestock is bought or sold on a weight basis, settlement therefore [sic] shall be on the basis of the actual weight shown on the scale ticket[s]. If the actual weight used is not obtained on the date and at the place of transfer of possession, this information shall be disclosed with the date and location of the weighing on the accountings, bills, or statements issued. Any adjustment to the actual weights shall be fully and accurately explained on the accountings, bills, or statements issued and records shall be maintained to support such adjustment.

The "clarified" version of 9 CFR § 201.55 is slightly better than the version in effect in 1978 since it states more clearly than the former that any explanation on the invoice as to "actual weights" could not, *e.g.*, include an explanation that the supporting scale tickets were phony, *i.e.*, that they included "shrink."

However, even under the version of 9 CFR § 201.55 in effect in 1978, when the section is read in conjunction with the weighing instructions, as must be done under well-settled principles of statutory construction,[107] the explanation on an invoice could not have stated that the scale tickets represented phony figures because, under the instructions, a registrant was not permitted to print a scale ticket containing phony figures. (In addition, as stated above, respondent's invoices contain no explanation that his scale tickets showed phony weights, and, therefore, respondent would not have complied with the regulation even if it were erroneously construed to permit such an explanation on an invoice.)

What is important here is that both versions of 9 CFR § 201.55 plainly state that when livestock is sold on a weight basis, as re-

[107] See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1, 11 (1962); *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949).

spondent did in the 13 alleged reweighing transactions, respond must (i) have all scale tickets necessary to prove his transfer weights, and (ii) make an appropriate explanation on the invoi as to his weight figures, since all of the weight figures necessary prove his invoice weights were not obtained at the place and ti of the consummation of the transaction in the reweighing trans tions (except Transactions 5, 12 and 14, under respondent's fa version of the facts). Failure to comply with that regulation wo have been an unfair and deceptive practice in violation of § 312 of the Act (7 U.S.C. § 213(a)).

Scale tickets printed to show weights used to *compute* an invo weight (or for other non-sale purpose), but which are not actuall *sale* weight (*e.g.*, the "in-weight" of the animals allegedly weigh at Pittsfield and the weight of the animals allegedly removed, referred to in the trade as "catch weights" (Tr. 29–31). The printi of "catch-weight" scale tickets is such a common custom in the dustry that the instructions specifically deal with the practice. Specifically, the instructions quoted above provide (9 CFR § 201.73-1(d)(3)):

> (3) No scale ticket shall be used to record the weight of a livestock draft for "catch-weight," inventory, transportation charge or other nonsale purposes unless the ticket is clearly marked to show why the weight was determined.[108]

However, a scale ticket showing the weight of the animals allegedly added at Pittsfield would not have been a "catch-weight." It would have been the *sale* weight of those animals directly governed by 9 CFR § 201.55, quoted above. That is, the livestock allegedly added from respondent's inventory at Pittsfield was not being sold on a transfer of weight basis but, rather, respondent purportedly was selling it on its actual weight at the time. Scale tickets were, therefore, required by 9 CFR § 201.55 for the animals allegedly added, just as scale tickets were required to prove the transfer of weights with respect to the other animals.

If respondent had actually handled the alleged reweighing transactions as he claims, presenting scraps of paper (worksheets) on which was written the Pittsfield arrival weight, the weight of the animals removed, and the weight of the animals added, rather

[108] The additional requirement in 9 CFR § 201.77, that the scale tickets for "catch-weight" purposes must show that "they are not weights for the purpose of purchase or sale," was removed effective October 24, 1984 (49 Fed. Reg. 37,371 37,374 (1984), because "[c]hanges in methods of marketing of livestock have eliminated the need for this regulation" (48 Fed. Reg. 42,823, 42,825 (1983)).

than scale tickets, as required by 9 CFR § 201.55, would have been just as outrageous as the conduct of an attorney handling a trust account who presented scraps of paper, rather than brokers' confirmation slips, stating that on certain dates he bought and sold various stocks for the account.

Scale tickets can be fabricated just as brokers' confirmation slips can be fabricated. But it is much easier to detect fraud if the person required to keep the prescribed documents actually presents the required documents rather than a scrap of paper on which he has allegedly recorded the vital events. As shown in subsection D, immediately following, where scale tickets are generated, the agency has investigatory tools for detecting fraud.

Recording all of the weights, as required, is not difficult or time-consuming. If respondent or his yardman actually had livestock on the scales for each of the weighing activities respondent contends took place, it would have taken no more time to print the weight by pressing or squeezing the hand lever of the scale's automatic printing device (Tr. 296) than to manually write each weight on a scrap of paper. The time consumed in printing a scale ticket is infinitesimal compared to the time involved in moving the animals onto the scale, getting the scale poise adjusted to the proper spot, and driving the animals off the scale.

It defies reason for respondent to contend that he and his yardman took all of the time to conduct the required weighing operations, but wrote the crucial weights by hand on scraps of paper rather than perform the more efficient, lawful method of squeezing the scale lever to print scale tickets. To do what respondent contends he and his yardman did would be so absurd that his contention is not believable. I infer that he made such a claim to cover up his more serious violation—weight padding. (Here, again, my inference is supported by the ALJ's determination that respondent and Mrs. Manson were not credible witnesses (see § XII(H), *infra.*)

D. Complainant's Investigation Was Not Faulty.

Respondent contends that the Department's investigation in the present case was faulty because the P&S investigators did not conduct some type of reweighing investigation. Stockyard owners, market agencies, dealers, and packers are required to "reweigh livestock on request of duly authorized representatives of the Secretary" (9 CFR § 201.76). The agency conducts check weighing investigations (where livestock is reweighed) and direct sales investigations, where preweighed livestock is sold, *e.g.*, to a dealer to determine whether the dealer is shortweighing. See Campbell, "The

Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, § 3.64 (1981 and Aug. 1984 Supp.).[109]

Since scale tickets are required to support all weight figures on invoices, the Department has frequently been successful in detecting false weights or weight padding. But where weights are handwritten on scraps of paper, rather than printed on serially numbered scale tickets, it would serve no useful purpose to attempt a reweighing investigation. Before a violator would provide the scraps of paper to the investigator, the weights would be changed, or new scraps of paper would be generated. Accordingly, it would have been useless to attempt a reweighing investigation at Pittsfield.[110]

Furthermore, it would have been useless for the investigators to have reweighed a load of livestock on arrival at the buyer's farm. There is not a livestock expert alive who can determine with any degree of reliability (just by weighing livestock, *e.g.*, at Kansas City, and later at the buyer's farm) whether a load which showed 6% shrink at the farm actually shrank 6% in transit, or whether it shrank 4% and the additional 2% shrink resulted from respondent's weight padding.

In the Department's direct sales investigations (described in Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law* at 273 (1981)), the agency's investigators carefully select and control livestock, generally over a period of about 2 days, so that they are "shrunk out." They then drive to a location about a mile from the premises being investigated, and reweigh the livestock on a scale accurate to the nearest pound. The livestock is immediately driven to the packer or dealer-buying station, where it is reweighed by the packer or dealer within just a few minutes after it has been weighed by the agency. Only under such carefully controlled circumstances, involving very short driving distances and very short time periods between the controlled

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[109] When false weighing was being practiced at the Chicago stockyards in the 1950's, the agency secretly installed automatic recording devices under the scales, which printed the weight every time the weigher printed a scale ticket. That led to the disciplinary sanctions affirmed in *Cella* v. *United States*, 208 F.2d 783 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), and *Meyer* v. *United States*, 211 F.2d 406 (7th Cir.) (per curiam), *cert. denied*, 347 U.S. 1016 (1954).

[110] In Transaction 7, respondent had a scale ticket purporting to show the weight of the animals allegedly added from inventory (RX 38). But respondent had no printed scale ticket for the alleged Pittsfield arrival weight of the lot or the weight of the animals allegedly removed (RX 39A). In Transaction 3, respondent had a scale ticket with a printed weight of 7,615 pounds and a pencil weight figure of 38,095 pounds (RX 20). The printed figure was the alleged weight of 17 head, including 7 head from inventory (RX 21; 4,460 + 3,155 = 7,615).

and suspect weighing operations, can a determination be made in such a direct sales investigation that livestock has been falsely weighed.

Accordingly, there is no basis for respondent's contention that the investigation in this case was defective because it did not include reweighing of livestock.

VIII. Adverse Inference Is Drawn Against Respondent for Not Calling Yardman Who Allegedly Weighed the Livestock on Arrival in Pittsfield.

Respondent testified that when livestock arrived at Pittsfield, his yardman weighed them and wrote the weight on a sheet of paper which was put on respondent's desk (Tr. 312-13; quoted in § VII(C)(2), *supra*).

Respondent's yardman was not named or called as a witness by respondent, notwithstanding the fact that his testimony was vital to respondent's case. He is the only person who could testify from firsthand knowledge that he weighed the livestock when they arrived at Pittsfield, and that they weighed the exact amount that he wrote on a sheet of paper. No other person could testify from firsthand knowledge as to this vital link in respondent's alleged calculation of the shrink per head (allegedly determined by subtracting the Pittsfield arrival weight from the purchase weight).[111]

Mrs. Manson testified on direct examination, "A lot of times I do the weighing" (Tr. 224; see, also, Tr. 130). However, she admitted on cross-examination that she only weighs in an emergency. She testified (Tr. 258, 282):

> A. . . . I am in another office and I don't handle the weighing of the cattle unless there is an emergency and I have to go out there. . . .
>
> * * * * * * *
>
> Q. Did I understand your testimony correctly from yesterday that you only weigh cattle in emergency situations?
>
> A. If they are busy and they need me; otherwise, I stay in my office. I've got a million other things to do. But if I have to, I do weigh cattle.

[111] It is not surprising that respondent did not call his yardman as a witness. As shown in the discussion of the individual transactions, respondent's worksheets containing the Pittsfield arrival weights of the livestock were fabricated to cover up his weight-padding violations.

Based on the testimony of respondent and his bookkeeper, it is clear that the yardman who was not called as a witness by respondent was the only person who allegedly could have given first hand information as to the vital arrival weights at Pittsfield (or even that the livestock was weighed upon arrival at Pittsfield).

In view of respondent's failure to call his yardman to testify, under the settled principle that has been followed in many proceedings before this Department,[112] which has also been followed in many judicial proceedings,[113] I infer that his testimony would have

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[112] *E.g., In re Petty*, 43 Agric. Dec. ___ (Oct. 31, 1984), *appeal docketed*, No. 3-84-2200-R (N.D. Tex. Dec. 19, 1984); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ___ (Oct. 6, 1983); *In re Farrow*, 42 Agric. Dec. ___ (Sept. 21, 1983), *aff'd in part and rev'd in part*, No. 83-2548 (8th Cir. Apr. 24, 1985) (merits affirmed; suspension reversed); *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 101-02 *aff'd*, 721 F.2d 1125, 1130 (7th Cir. 1983); *In re Stamper*, 42 Agric. Dec. 20, 32 n.4 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 402-03 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 6[illegible] (3d Cir. 1983); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1507 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd* (unpublished), 742 F.2d 1462 (9th Cir. 1984); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1363-64 (1980), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Purvis*, 38 Agric. Dec. 1271, 1276-77 (1979); *In re Wilcox*, 37 Agric. Dec. 1659, 1666-67 (1978); *In re Central Ark. Auction Sale, Inc.*, 37 Agric. Dec. 570, 586-87 (1977), *aff'd*, 570 F.2d 724 (8th Cir.) (2-1 decision), *cert. denied*, 436 U.S. 957 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 305, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Burrus*, 36 Agric. Dec. 1668, 1686-87 (1977), *aff'd per curiam*, 575 F.2d 1258 (8th Cir. 1978); *In re DeJong Packing Co.*, 39 Agric. Dec. 607, 637-38 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Loretz*, 36 Agric. Dec. 1087, 1100-01 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1558 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Whaley*, 35 Agric. Dec. 1519, 1522 (1976); *In re Casca*, 34 Agric. Dec. 1917, 1929-30 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1571-72 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 514 (1974), *aff'd per curiam* (unpublished), 510 F.2d 966 (4th Cir. 1975); *In re Speight*, 33 Agric. Dec. 280, 300-01 (1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 499 (1972).

[113] 2 Wigmore, *Evidence* (3d ed. 1940), §§ 285-291; *United States* v. *Di RE*, 332 U.S. 581, 593 (1948); *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-27 (1939); *Kirby* v. *Tallmadge*, 160 U.S. 379, 383 (1896); *Karavos Compania, Etc.* v. *Atlantica Export Corporation*, 588 F.2d 1, 9-10, (2d Cir. 1978; *International Union* v. *N.L.R.B.*, 455 F.2d 1357, 1362-70 (D.C. Cir. 1971); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 592, 597 (8th Cir. 1965); *Cromling* v. *Pittsburgh & Lake Erie R.R. Co.*, 327 F.2d 142, 148-49 (3d Cir. 1963); *Hoffman* v. *C.I.R.*, 298 F.2d 784, 788 (3d Cir. 1962); *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834-35 (8th Cir. 1959); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-71 (7th Cir. 1950); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (7th Cir.), *cert. denied*, 327 U.S. 805 (1946); *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256-57 (C.C. P.A. 1939); *National Labor Relations Bd.* v. *Remington Rand Inc.*, 94 F.2d 862, 867-68 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938).

been adverse to respondent's position here. "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch v. Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* (3d ed. 1949), § 285.

IX. No Adverse Inference Is Drawn Against Complainant for Not Calling Kostelecky as a Witness Since He Played Only a Minor Role in the Investigation. Gentry's Testimony as to the Investigation Is Not Hearsay. Adverse Inference Is Drawn Against Respondent for Not Giving Worksheets to the Investigators. Respondent's Deceptive Briefs Exposed. Respondent Failed to Give Investigators Scale Tickets for Transactions 1-7, and 9 Because They Would Have Prompted Investigators to Ask for Nonexistent Worksheets.

The court states (723 F.2d at 582 n.1, 583):

> Because of our resolution of the case, it is not necessary to reach Saylor's contention that the decision is not supported by substantial evidence. We note, however, his claim that the investigation and hearing did not afford due process. He supports this claim with arguments directed at the circumstantial evidence relied upon by the USDA and the hearsay nature of much of the testimony at the hearing. These aspects, he claims, made it impossible for him to present a meaningful defense. We do not agree that the use of circumstantial evidence and hearsay testimony amounted to a violation of due process in this case. However, the weight to be accorded this evidence is less than if it had been direct, non-hearsay and highly probative.
>
> * * * * * * *
>
> The USDA bases its distrust of the scale tickets in part on the failure of those tickets to be produced at the initial audit conducted by William Kostelecky of Saylor's business. However, it is unclear from the record whether Kostelecky requested this information. In any event, the USDA did not call Kostelecky to testify at the hearing. We recently approved the USDA's practice of drawing an adverse inference from a party's failure to call a potentially important witness. *See Mattes* v. *United States*, 721 F.2d 1125 at 1130 (7th Cir. 1983). What is sauce for the goose is

sauce for the gander, and we believe a like inference may be drawn here against the USDA.

A. All of Gentry's Testimony as to the Investigation Was Based on Personal Knowledge—Not Hearsay. Complainant's Investigators Requested All of Respondent's Records on January 29, 1979. No Worksheets Were Furnished, and the Scale Tickets for Transactions 1-7, and 9 Were Not Furnished.

The court's view that we relied on "much" hearsay is based on respondent's deceptive briefs. Respondent's briefs set forth a fictional tale (more appropriate for inclusion in a book of fairy tales than a legal brief) to the effect that Mr. Kostelecky was the chief investigator in this case, Mr. Gentry's testimony was heresay as to what Mr. Kostelecky told him and found, and that only Mr. Kostelecky looked for the scale tickets involved in the transactions prior to Transaction 10. Respondent's Appeal to Judicial Officer at 11-12 states:

> The complainant contends that Saylor, or his employee, Dorothy Manson, withheld load makeup sheets and scale tickets from Mr. Kostelecky. Mr. Kostelecky did not testify. Instead, the marketing specialist, Mr. Gentry, testified about what Kostelecky did. Mr. Gentry testified as to what "his auditor" did and what "his audit found" (Tr. 8).[114] Mr. Gentry stated that he reviewed the work of Kostelecky (Tr. 366, line 22; Tr. 369, lines 24–25). He admitted he was only "somewhat" involved in the total investigation.[115]

Similarly, respondent's brief on remand filed April 2, 1984, at 21-22 states:

> It cannot be denied that Mr. Kostelecky fits the role of the USDA's chief witness. He conducted the investigation. Mr. Gentry fit the role of a supervisor. He reviewed Kostelecky's report (T. 8;336;369). Gentry might have actually got involved in the review of some documents on the second visit, when, it is obvious, they only reviewed transactions that occurred after mid-October 1978. When Gentry was involved, reviewing documents for the period from mid-October to January 1979, scale tickets were

[114] Note the quotation of a few words from Tr. 8. Respondent's attorney's deception as to this matter is exposed below in this section.

[115] Note the quotation of one word, "somewhat," from Tr. 369, lines 24-25. Respondent's attorney's deception as to this matter is exposed below in this section.

found for all transactions then being reviewed. When Kostelecky was unsupervised, he "found" no scale tickets.

Date of Transaction	Did Auditor "Find" Scale Tickets?	
August 10	No	Kostelecky only
September 13	No	
September 27	No	
October 5	No	
August 31	No	
September 14	No	
September 28	No	
October 13	Not reweighed	
October 13	No	
October 30	Yes	
November 18	Yes	
November 7	Yes	
November 30	Yes	
December 2	Yes	

(Source: Cx. Ex. 1-14)

Did Kostelecky look for scale tickets on his first visit, in mid-October? Obviously not. Dorothy Manson testified that Kostelecky did not know the basics of the livestock business (T. 139). Apparently he did not know that Saylor sorted cattle. Apparently he did not think to look for scale tickets because he thought Saylor merely bought cattle on order and sold the loads as is, i.e., straight shipments.

The facts as revealed by the record show that Mr. Gentry was in charge of the investigation and personally conducted the investigatory activity both withrespect to Transactions 1-9, occurring prior to mid-October 1978, and Transactions 10-14, which occurred thereafter. The record further reveals that while Mr. Gentry was personally conducting the investigation, with Mr. Kostelecky's assistance, all of respondent's records were requested, but none of the worksheets were supplied, and only the scale tickets beginning with Transaction 10 were supplied.

Of course I know from my prior experience with the Packers and Stockyards Administration how a trade practice investigation such as this is handled by Mr. Gentry, a livestock marketing specialist, assisted by an auditor, Mr. Kostelecky. But my conclusions here are not based on my prior experience. They come straight from the record. Since "Tr. 8" is frequently cited by respondent's attorney as support for his view that Mr. Gentry's testimony was hearsay,

based on what Mr. Kostelecky did and found, I am quoting Tr. 8 in its entirety, and consecutively numbering each sentence of Mr Gentry's answers (shown in brackets) so that the subsequent points of discussion as to Tr. 8 can be easily referenced. Mr. Gentry testified (Tr. 7-9, 19-21, 366) (sentence numbers of Mr. Gentry's testimony at Tr. 8 shown in brackets):

Q. Mr. Gentry, what is your occupation?

A. Livestock marketing specialist with the Packers and Stockyards Administration, U.S. Department of Agriculture.

Q. How long have you held that title?

A. Approximately 21 years, or a similar title.

Q. How long have you been employed by the Department of Agriculture?

A. The same length of time, about 21 years.

Q. Mr. Gentry, are you familiar with an investigation which preceded the filing of a complaint in this case?

A. Yes, sir.

Q. Did you participate in that investigation?

A. I did.

Q. Will you explain for us, please, your role in [PAGE 8 BEGINS HERE] that investigation?

A. [1] In a sort of a chronological method, I would assume?

Q. That would be fine.

A. [2] Our office had an auditor to make a routine financial audit of Mr. Saylor's operations; and before he proceeded to do this, the market and [marketing] practices side of our office decided that, if time permitted, that he might pick off some purchases and sales invoices and make tabulations of them to try to determine if the records would support the transfer of weights and prices from Saylor's purchases to his sales, or to his customers. [3] This would have been on October 10 of '78.

[4] So after reviewing the tabulations of the auditor, it was decided we would go back and did go back, and this

time I went with the auditor, and made photocopies of the records and studied records that were given to us by Mr. Saylor, made copies of them. [5] This would be on January 29 of '79. [6] So after the study and copy of these records, by prior arrangements, we made arrangements with Mr. Saylor to talk with him, and he requested that Mrs. Manson also be with us when we were talking with him about this.

Q. (Interrupting) Who is Mrs. Manson?

A. [7] It's an employee, of course, of Mr. Saylor.

(Continuing) —and during this conversation, we

[PAGE 8 ENDS HERE] did bring up the thought that we had that the records does not support some of the weights that he is transferring to his customer.

* * * * * * *

Q. Mr. Gentry, you testified earlier that during the course of your investigation you visited Mr. Saylor's place of business and spoke with him and an employee of his on more than one occasion. During those conversations with Mr. Saylor and—Mrs. Manson, is that correct?

A. Yes, sir.

Q. Did you request any specific records?

A. Yes. On our first appearance on January 29, we requested that we have all of his records that had to do with his livestock dealing transactions, such as buyers' bills, sales bills, scale tickets, bank statements, drafts, cancelled checks, deposits slips, and such.

Q. What did you receive in response to that request?

A. Well, we received most of the things that I named with the exception of scale tickets. There seemed to be very few of those. There were some scale tickets, no makeup sheets or this kind of thing.

Q. What is a make-up sheet?

A. Well, load makeup. We normally talk about where they might weigh cattle on or weigh cattle off and these things, and we didn't get any of this kind of record.

Q. Some of the exhibits we've examined this morning include copies of scale tickets. When did you receive those scale tickets?

A. Well, to the best of my knowledge, of course, we were there a time or two—I think, though, the scale tickets we have in our reports came on the first visit, on the visit of January 29.

Q. The exhibits in the evidence, Nos. 1 through 14, evidence 14 different transactions by the Respondent. Did you identify these transactions specifically when speaking to Mr. Saylor and Mrs. Manson?

A. We did identify those specifically at one point, yes, sir.

Q. Did you request any supporting documentation?

A. Yes, sir. On April 10, I think it was, we were back because some mention was made in our interview in some of the people that did trucking for Mr. Saylor, there was a mention of trip sheets, and we did go back and ask for copies of specific trip sheets; and Mr. Saylor, with the help of Mrs. Manson, secured those trip sheets for us and we made copies of those.

Q. Copies of those trip sheets, requested trip sheets, appear in the record?

A. Yes, sir.

* * * * * * *

Q. Did you receive any worksheets at that time?

A. No, sir.

* * * * * * *

Q. . . . The respondent has introduced a number of exhibits which have been referred to as worksheets. Before the complaint was filed in this case, had you ever seen any of those worksheets?

A. No, sir.

Q. The respondent has introduced a number of scale tickets. Before the complaint ticket [sic] was issued in this

case, had you ever seen any of the scale tickets evidenced in the respondent's exhibits?

A. I am not sure. There were some complainant's scale tickets, I believe, which were in the report, but there was not all of them there. There were many produced or showin [sic] in respondent's exhibit that I have never seen before.

From Mr. Gentry's opening statement as to the course of the investigation (Tr. 8, sentence numbered 2), we learn, first, that a Regional Office of the Packers and Stockyards Administration has auditors, who engage in activities such as routine financial audits (*e.g.*, to determine if a dealer is solvent (7 U.S.C. § 204) or has a large enough bond (9 CFR §§ 201.29, .30)), and a marketing practices side, which conducts investigations such as the one involved here.

Respondent contends (and complains) that Mr. Kostelecky, the auditor, knew very little about livestock marketing. That may well be true. (I know nothing of his length of service with the Packers and Stockyards Administration or his prior experience, but I would not be at all surprised if he knew a lot about conducting financial audits and little or nothing about conducting a trade practice investigation, such as the one involved here.) Mr. Gentry, on the other hand, had been a livestock marketing specialist with the agency for 21 years in December of 1981, or about 18 years as of the time of the investigation.[116]

Mr. Gentry's opening statement as to the investigation (Tr. 8, sentences numbered 2 and 3) also shows quite clearly that Mr. Kostelecky's chief interest in mid-October 1978 was his financial audit. He was instructed by the marketing practices side of the office to "pick off some purchases and sales invoices and make tabulations of them" only if time permitted (Tr. 8).

Based on the undisputed testimony in the record, there is no reason to believe that Mr. Kostelecky asked for, or looked at, any scale tickets in mid-October 1978. And this Department has never suggested to the contrary! All Mr. Kostelecky did at his initial audit in mid-October 1978 was make tabulations of purchases and sales. He did not copy any records. (In fact, there is no reason to

[116] Unfortunately, the record does not show Mr. Gentry's educational background and experience prior to his employment with the Packers and Stockyards Administration. Presumably, his expertise was not fully developed since he did little more than identify exhibits and explain the nature of the investigation. (Respondent does not have to infer from this comment that I knew Mr. Gentry when I was Administrator of the Packers and Stockyards Administration. Of course I knew him.)

believe either from the record or from my knowledge as to the agency's activities that Mr. Kostelecky even had a photocopy machine with him in mid-October 1978 when he was conducting his "routine financial audit" (Tr. 8)). Accordingly, contrary to the court's view (723 F.2d at 583), *no part* of USDA's "distrust of the scale tickets" is based "on the failure of those tickets to be produced at the initial audit conducted by William Kostelecky of Saylor's business." Admittedly, however, our prior Decision gave the court no light as to this matter.[117]

The record does not contain Mr. Kostelecky's tabulations made as a result ofhis mid-October 1978 audit.[118] (I have, of course, seen similar tabulations prepared by the agency's auditors, and I know what it must look like.) However, there is no reason why the record should contain the tabulations. The tabulations did no more than to arouse enough interest in respondent's activities to cause an investigation (Tr. 8, sentence numbered 4). Section 402 of the Packers and Stockyards Act (7 U.S.C. § 222) incorporates by reference sections 6, 8, 9 and 10 of the Federal Trade Commission Act (15 U.S.C. §§ 46, 48–50), giving the agency complete investigatory authority as to all persons subject to the Act. Hence complainant had authority to conduct the investigation irrespective of whether Mr. Kostelecky's tabulation was sound or unsound.[119] (And the Secretary may issue a complaint whenever he has "reason to believe" a violation occurred. 7 U.S.C. § 213(b)).

Continuing the analysis of Mr. Gentry's testimony, quoted above from Tr. 8, which is cited so frequently by respondent as support for his view that Mr. Gentry's testimony was hearsay "as to what

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[117] Respondent's first deceptive brief (Petition for Reconsideration) was filed after the ALJ and I had originally decided the case. Hence the ALJ cannot be blamed for ot responding to respondent's attorney's deception. I chose not to respond to the ception because of the enormous amount of time that would have been required to pose it, as I have done here. I chose, instead, to rely on the fact that the ALJ did t believe respondent or his bookkeeper.

[118] If respondent had subpoenaed the Department's investigation report, and the ALJ had directed complainant to produce it, complainant would likely have refused even to permit an *in camera* inspection of the report, and I would likely have sustained complainant's position, as was done in *In re Machado*, 42 Agric. Dec. 820, 821–87 (1983) (remand order), *final decision*, 42 Agric. Dec. ___ (Oct. 20, 1983) (decizi), *aff'd*, No. 83-7950 (9th Cir. Oct. 22, 1984). But that is that need not be repeated here, since respondent did not

'his auditor' did and what 'his audit found' (Tr. 8)" (Appeal to Judicial Officer at 11-12), we see that nothing in Mr. Gentry's testimony supports that fictional view.

Mr. Gentry's testimony (Tr. 8, sentence numbered 4) that he reviewed the tabulations of the auditor relates solely to the tabulations of the auditor made at his mid-October 1978 visit, which tabulations were so inconsequential that they were not introduced into evidence. For respondent's attorney to use Mr. Gentry's testimony as to his review of those insignificant tabulations as support for his argument that Mr. Gentry's subsequent testimony was hearsay, when he outlined the investigation, is a deliberate distortion of the record designed to mislead the Judicial Officer and the court.

In fact, in the same sentence in which he referred to reviewing the tabulations (Tr. 8, sentence numbered 4), he then used the first-person-singular personal pronoun "I" in describing who made the photocopies of the records and who studied the records. Specifically, he testified that "it was decided *we* would go back and did go back, and this time *I* went with the auditor, and made photocopies of the records and studied records that were given to us by Mr. Saylor, made copies of them" (Tr. 8, sentence numbered 4, emphasis added).[120] (Even if Mr. Gentry had not used the personal pronoun "I," I would have inferred that Mr. Gentry decided what to copy since (1) respondent claims that Mr. Kostelecky was a young auditor with no knowledge of livestock marketing practices, (2) Mr. Gentry was a highly experienced livestock marketing specialist, and (3) the marketing practices side of the Regional Office, rather than the auditing side, initially decided that tabulations of respondent's purchases and sales should be made, if time permitted.)

Mr. Gentry's testimony that "I" made photocopies of the records, fairly construed, would not exclude Mr. Kostelecky's assistance, since Mr. Gentry testified that he went with Mr. Kostelecky, and, presumably, Mr. Kostelecky was not reading comic books while Mr. Gentry was photocopying the documents. But it does show that Mr. Gentry was personally involved in (and in charge of) the photocopying. Moreover, the record indicates (and my personal experience confirms) that they copied *every* document given to them. (It would have been totally irrational to decide, at that preliminary stage of the investigation, that some records were not worth copying.) Specifically, Mr. Gentry testified that "I . . . made photocopies of the

[120] Note that the comma after "auditor" was inserted by the reporter—not by Mr. Gentry. He may have paused after he said "auditor," but his oral statement was "this time I went with the auditor and made photocopies of the records and studied records. . . ."

records and studied records that were given to us by Mr. Saylor made copies of them" (Tr. 8, sentence numbered 4). Note, that Mr. Gentry testified that he made "copies of them"—not "copies of some of them."

Other testimony by Mr. Gentry further shows that he personally examined the documents as to Transactions 1–9 (referred to by respondent as those examined only by Mr. Kostelecky). Mr. Gentry testified that on CX 4, p. 1 (Transaction 4), the pencil number at the bottom of the left-hand corner in the border of the original exhibit (JO Ref. 19, p. 23) "was inserted by me" to show what was visible on the film (Tr. 11). The same type of pencil number on CX 5, p. 1 (Transaction 5), "was entered in the border by me" (Tr. 11), according to Mr. Gentry's testimony.

Referring to the same type of pencil number on CX 9, p. 1 (Transaction 9), Mr. Gentry swore that "I entered that in there to indicate the number that was visible on the copy we had on film" (Tr. 13). Mr. Gentry testified on direct examination, as to writing that appears above the photocopy of the trip sheet for Transaction 9 (CX 9, p. 8), that "this is writing, and it's on a separate little sheet of paper that I stuck in there for note purposes that got caught up in our duplicating" (Tr. 13).[121] Hence unless Mr. Gentry was committing perjury, he photocopied the records relating to all the transactions, including Transactions 1–9, and he went over the photocopies, making pencil notes or marginal notes as he deemed appropriate.

Mr. Gentry knows the meaning of "I" and "me." And he did not claim credit for what he did not personally do. For example, Mr. Gentry explained that a document referred to as "No. 21" (Tr. 16), actually CX 20, p. 2, is the original copy from the film and "No.

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[121] Respondent's attorney states as to Mr. Gentry's note (Appeal to Judicial Officer at 8):

> This man, who the Administrative Law Judge lauded as being a fair and unbiased P&S employee, was caught in the act of bludgeoning the facts. If the trip sheets show a stop in Pittsfield, Mr. Gentry would just write an explanation that it really should not say that. If the facts get in the way, we'll just make a notation to change the facts.

Nonsense! Mr. Gentry's note states (CX 9, p. 8): "Trip Sheet shows Jacksonville from Pittsfield. Should be K. C. to Jacksonville." Mrs. Manson's check stub for this transaction shows exactly what Mr. Gentry's note says, *i.e.*, she lists the origin and destination as "KC-Jacksonville" (CX 9, p. 9). Hence unless Mrs. Manson's check stub bludgeons the facts, Mr. Gentry's note does not bludgeon the facts. (Complainant concedes, however, that this shipment from Kansas City to Jacksonville passed through Pittsfield.) Mr. Gentry's note as to Transaction 9 is reproduced in § VI(A), *supra*, p. 233.

20," actually CX 20, p. 1, "is the traced-over copy by Jeff Kasteleki" (Tr. 16).[122]

Looking now at Mr. Gentry's testimony at Tr. 8, sentence numbered 6, the sentence is reproduced below with the persons obviously referred to by Mr. Gentry's personal pronouns identified in brackets. A portion of the sentence is emphasized not because of its importance, but only to identify that portion of the sentence that appears on line 21 of Tr. 8 (which is deceptively cited by respondent's attorney).

> So after the study and copy of these records, by prior arrangements, we [Gentry and Kostelecky] made arrangements with Mr. Saylor *to talk with him [Saylor], and he [Saylor] requested that Mrs. Manson also* be with us [Gentry and Kostelecky] when we [Gentry and Kostelecky] were talking with him [Saylor] about this.

Respondent's attorney argues in his Petition for Reconsideration at 6 that Mr. Gentry was testifying at Tr. 8, line 21, emphasized above, that Mr. Kostelecky, not Mr. Saylor, requested that Mrs. Manson "also be with us when we were talking with him about this." Specifically, respondent's attorney argues (Petition for Reconsideration at 6):

> At numerous other points in the record Mr. Gentry testified as to what he (Kasteleki) said (i.e., Tr. 8 line 21). . . .

Only a functional illiterate could interpret Mr. Gentry's testimony at Tr. 8, line 21, as stating that Mr. Kostelecky requested that Mrs. Manson "be with us when we were talking with him about this." Respondent's attorney is not a functional illiterate. Hence he was being deliberately deceptive.

Further developing the fact that Mr. Gentry testified solely from first-hand knowledge as to the investigation, the record shows that there were a number of meetings between the investigators and respondent and/or his bookkeeper at respondent's office, at an accountant's office (in connection with the January 29, 1979, audit), at the Green Acres Motel (in connection with the April 10 visit), and finally at complainant's Springfield, Illinois, Regional Office. Mr. Gentry was present with Mr. Kostelecky at all of those meetings (Tr. 8-9, 20-25, 137-40, 300-02).[123]

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[122] Actually, Mr. Gentry appears to have been in error, since CX 20, p. 1, has a notation at the bottom stating "copied from film by D. G. Bowen." But this shows that Mr. Gentry did not use "I" or "me" for the work of others.

[123] Respondent's briefs seem to suggest at times that Mr. Gentry was not present at some of those meetings (*e.g.*, Petition for Reconsideration at 6-7 (note his citation

Continued

Respondent's attorney argues that the fact that Mr. Kostelecky, rather than Mr. Gentry, took the affidavits introduced in evidence also shows that Mr. Kostelecky conducted most of the investigation, and that Mr. Gentry's testimony was primarily hearsay. He states (Appeal to Judicial Officer at 15) (emphasis added):

> He [the ALJ] believes the testimony of one man, an employee of complainant, Mr. Gentry, whose testimony is primarily hearsay. Mr. Gentry testified 1.) as to what Kostelecky did when Kostelecky went alone to "pick out some transactions" (Tr. 8 *et seq.*),[124] 2.) what Kostelecky later did under his supervision,[125] and 3.) what he himself learned after the investigation was underway. *You will note that the affidavits bear the name of Kostelecky, indicating that he, not Gentry, was primarily involved in doing the legwork.*

Here, again, I reach the exact opposite conclusion reading the record from that presented in respondent's attorney's brief. The record contains five affidavits, four from farmers, one from a trucker. The name of "William E. Gentry" appears on the front page of the affidavits of the four farmers, as the person before whom the farmer appeared (CX 15, p. 1; CX 16, p. 1; CX 17, p. 1; CX 19, p. 1). Mr. Kostelecky's signature appears as "WITNESS" at the bottom, left-hand corner of the last page of three of those affidavits (CX 15, p. 4; CX 16, p. 4; CX 19, p. 4). Mr. Kostelecky's name does not even [illegible] as a witness on the fourth farmer's affidavit; but, rather, [illegible]icek" is the witness (CX 17, p. 4), indicating that Mr. Kos[illegible] was not even along when that farmer (Mr. Jennings) was [illegible]ed. To illustrate, the first and last page of Mr. Graf's affi[illegible]duced on the next two pages (CX 19, pp. 1, 4):

Affidavit of Customer Harold L. Graf (CX 19, p. 1)

United States Department of Agriculture

PACKERS AND STOCKYARDS ADMINISTRATION

AFFIDAVIT

FOR USE IN ANY PROCEEDING OR ACTION
UNDER THE PACKERS AND STOCKYARDS ACT, 1921,
AS AMENDED AND SUPPLEMENTED (7 U.S.C. 181 et seq.)

STATE OF Illinois)
) SS:
COUNTY OF Lee)

BEFORE ME, William E. Gentry,
an employee of the United States Department of Agriculture, designated by the Secretary of Agriculture under authority of the Act of January 31, 1925, 43 Stat. 803, 7 U.S.C. 2217, personally appeared

Harold L. Graf
(NAME)

1030 Myrtle Dixon, Ill.
(HOME ADDRESS)

Graf Cattle Co.
(FIRM)

Ashton, Ill.
(FIRM ADDRESS)

transcribed as a complaint P-365 [illegible] 5/28/[illegible]

who deposes and says:

This statement consists of 4 pages of which this is page 4

I have read the foregoing statement and it is true and correct. I give such statement freely and voluntarily, without threats or promises having been made, knowing that it may be used in the administration of the Packers and Stockyards Act, 1921, as amended, and the regulations thereunder.

(SIGNED)

SUBSCRIBED AND SWORN TO before me at Ashton Illinois, on this 23rd day of March, 1979.

William E. Gentry
Employee of the United States Department of Agriculture, designated pursuant to law to administer oaths.

Authorization No. _____

WITNESS:

COMPLAINANT'S EXHIBIT 1,
PAGE NO. 4

Only on the affidavit of the trucker, Mr. McGlauchlen, is Mr. Kostelecky's name shown on the first page (CX 18, p. 1), and Mr. Gentry's name shown as "WITNESS" (CX 18, p. 3). Hence I infer from the affidavits (what is consistent with my prior experience with the Packers and Stockyards Administration) that Mr. Gentry took the lead in questioning the four farmers, and that he permitted Mr. Kostelecky to take the lead in questioning the trucker, since a knowledge of livestock marketing was not necessary to take the affidavit of the trucker.

We come, now, to the statement in respondent's Appeal to Judicial Officer at 12:

> He [Mr. Gentry] admitted he was only "somewhat" involved in the total investigation.

That statement is the most false and deceptive statement I have ever seen in any legal brief. In his preceding sentence, respondent's attorney cites Tr. 369, lines 24–25, as the source for that statement. Let us examine those lines in context (Tr. 369–70) (emphasis added):

> By Mr. HEINZ:
>
> Q. *Mr. Gentry, as a result of your investigation of the respondent's records, did you prepare a tabulation of all purchases and sales during the period under review?*
>
> A. *It was done somewhat under my direction and I was involved in it, yes.*
>
> Q. Have you recently reviewed that tabulation for the period surrounding the date 10/6/80?
>
> A. Yes.
>
> Q. Did you discover in that review transactions involving Graf Cattle Company?
>
> A. Yes, sir.
>
> Q. The record indicates, in Complainant's Exhibit No. 4, that there was a purchase by Graf of 55 head. Did your tabulation reveal a purchase by Graf, any other purchase by Graf on that date?
>
> A. Yes, sir.
>
> Q. How many head?
>
> A. I believe there were 60.

Q. Was that 60 head divided into any sub parts?

A. Yes.

Q. How many?

A. There were 7 in [and] 53.

Mr. HEINZ: I have no further questions of Mr. Gentry.

Mr. SCHIMMEL: I have no questions.

Note that the question referred to Mr. Gentry's investigation, *i.e.*, "Mr. Gentry, as a result of *your* investigation of the respondent's records . . ." (Tr. 369) (emphasis added). More importantly, however, is that what Mr. Gentry testified was done "somewhat under my direction" was the preparation of a "tabulation of all purchases and sales during the period under review" (Tr. 368). That tabulation is so inconsequential in this case that it was not even offered in evidence.

By the process of alchemy (which sought to transform base metal into gold), respondent's attorney transforms an admission that Mr. Gentry was only "somewhat" involved in preparing one insignificant tabulation into a statement that Mr. Gentry "admitted he was only 'somewhat' involved in the total investigation."

Just three pages prior to the testimony distorted by respondent's attorney, the following appears, which is the opening question in Mr. Gentry's rebuttal testimony (Tr. 366) (emphasis added):

DIRECT EXAMINATION

By Mr. HEINZ:

Q. *Mr. Gentry, you have testified that you conducted most of the investigation which preceded the filing of the complaint in this case* and that you reviewed the respondent's records in preparation for the investigative report from which exhibits filed by the complainant were prepared. Before the complaint—strike that.

The respondent has introduced a number of exhibits which have been referred to as worksheets. Before the complaint was filed in this case, had you ever seen any of those worksheets?

ring all of Mr. Gentry's testimony on
ant's attorney characterized the testi-
ave testified that you conducted most

of the investigation which preceded the filing of the complaint in this case" (Tr. 366). Neither Mr. Gentry nor respondent's attorney objected to that characterization of Mr. Gentry's testimony. (Actually, Mr. Gentry never used those exact words, but it is a fair characterization of his testimony when viewed in its entirety.) If respondent's attorney (who is not the same attorney now writing the deceptive briefs) wanted to question that characterization of Mr. Gentry's testimony, that was his occasion to do so. He did not do so then, and, as quoted above, he asked no questions of Mr. Gentry on his rebuttal testimony (Tr. 370).

This is not the end of respondent's attorney's deception and false statements as to this matter. When respondent's attorney's false statement was challenged in complainant's response, respondent distorted complainant's objections, and attempted to justify his original brief! Specifically, complainant's attorney stated in his Response to Appeal from Decision and Order on Remand at 4-5:

> This case is riddled with respondent's distortions and misrepresentations, but he sinks to a new low in misrepresentation at pages 11 and 12 of his appeal:
>
> > Mr. Kostelecky did not testify. Instead, the marketing specialist, Mr. Gentry, testified about what Kostelecky did. Mr. Gentry testified as to what "his auditor" did and what "his audit found" (Tr. 8). Mr. Gentry stated that he reviewed the work of Kostelecky (Tr. 366, line 22; Tr. 369, lines 24-25). He admitted he was only "somewhat" involved in the total investigation.
>
> This is what the transcript actually reveals at pages 369-370:
>
> * * * * * * *
>
> Mr. Gentry's testimony at this point in the transcript is obviously directed only to a specific tabulation. To state that he "admitted he was only 'somewhat' involved in the total investigation" egregiously and futilely misrepresents the record in this case, since this particular misrepresentation is part of a lengthy but totally irrelevant argument regarding Mr. Kostelecky and scale tickets.

Undaunted by complainant's exposure of his deception, respondent's attorney argued that his Appeal was correct, stating (Respondent's Reply To Complainant's Response To Appeal at 6):

> 7. On page 4 of its brief complainant states that Mr. Gentry did not mean to say that he was only "somewhat" involved in the investigation. The record shows that Mr. Gentry did in fact use that word, and the contention that he was only "somewhat" involved in the investigation is fully supported by his testimony (i.e., Tr. 8, he said he reviewed the auditor's work) and by a review of the full record in this case.

Looking at the first sentence quoted immediately above, complainant did not state that "Mr. Gentry did not mean to say that he was only 'somewhat' involved in the investigation." Complainant stated that Mr. Gentry never made that statement!

Looking at the second sentence quoted immediately above, respondent's attorney makes the amazing statement that "Mr. Gentry did in fact use that word. . . ." Of course, Mr. Gentry used the word "somewhat," but in a totally different context than that used by respondent's attorney.

Continuing in the second sentence quoted immediately above, respondent's attorney again cites Tr. 8 as support for respondent's claim that Mr. Gentry "said he reviewed the auditor's work." But as shown above in this subsection, Mr. Gentry's testimony at Tr. 8 is that he reviewed the auditor's tabulations from his mid-October 1978 audit, which were so insignificant that they were not offered in evidence in this case.

Brief mention should be made of a related, misleading statement by respondent's attorney. He states (Respondent's Reply to Complainant's Opening Brief on Remand at 12):

> Gentry testifed about a report submitted by Kostelecky (Tr. 366, line 22; Tr. 369, line 24-25). In this way complainant was able to prevent respondent from cross-examining Kostelecky.

The reference to Tr. 369, lines 24-25, relates to the matter just discussed, *i.e.*, where Mr. Gentry testified that a "tabulation of all purchases and sales during the period under review" was made "somewhat under my direction and I was involved in it." There was no reason to cross-examine anyone as to that "tabulation of all purchases and sales" since it was not introduced in evidence.

However, the reference to Tr. 366, line 22, is a subtle deception. Mr. Gentry's testimony cited by respondent is quoted immediately below, with line 22, cited by respondent, emphasized (Tr. 366, emphasis added):

Q. Mr. Gentry, you have testified that you conducted most of the investigation which preceded the filing of the complaint in this case and that you reviewed the respondent's records in preparation for the investigative report from which the exhibits filed by the complainant were prepared. Before the complaint—strike that.

The respondent has introduced a number of exhibits which have been referred to as worksheets. Before the complaint was filed in this case, had you ever seen any of those worksheets?

A. No, sir.

Q. The respondent has introduced a number of scale tickets. Before the complaint ticket [sic] was issued in this case, had you ever seen any of the scale tickets evidenced in the respondent's exhibits?

A. I am not sure. There were some complainant's [line 22 begins here] *scale tickets, I believe, which were in the report, but* [line 22 ends here] there was not all of them there. There were many produced or showin [sic] in respondent's exhibit that I have never seen before.

Respondent's attorney, by his citation of Tr. 366, line 22, as support for his statement that "Gentry testified about a report submitted by Kostelecky (Tr. 366, line 22)," is stating that the entire investigation report in this case was "submitted by Kostelecky." That nonsense has been emasculated above.

In conclusion, the record shows that none of Mr. Gentry's testimony as to the investigation was hearsay. It was all based on his personal knowledge and conduct. Respondent's attorney's deceptive briefs as to this matter (and others) do not meet the ethical standards required of a member of the Bar who appears before this Department (7 CFR § 1.141(c)).

Further, the record shows that on January 29, 1979, complainant's investigators asked for all of respondent's records relating to the transactions involved here, and that none of the worksheets were given to them, and only a few of the scale tickets were given to them.

B. Mrs. Manson Admits that All Scale Tickets Were Requested, and Claims She Furnished Them and the Worksheets to the Investigators. Her Admission Is Accepted, Her Claim Is Rejected, and No Adverse Inference Is Drawn Because of the Failure of Kostelecky to Testify.

Mr. Gentry testified that "on January 29, we requested that we have all of his records that had to do with his livestock dealing transactions, such as buyers' bills, sales bills, scale tickets, bank statements, drafts, canceled checks, deposits slips, and such" (Tr. 19).

Note that Mr. Gentry did not specifically say that they asked for "worksheets," or "make-up" sheets. He may not have known at that stage of the proceeding that respondent claimed to have sorted and substituted animals. But their request for "all of his records that had to do with his livestock dealing transactions" was broad enough to require the production of the worksheets. Both Mrs. Manson and respondent knew that the worksheets were the most important documents to explain and support his version of the weights invoiced to the buyers. The worksheets introduced in evidence by respondent would have been instantly recognized by any of complainant's marketing specialists.

Mr. Gentry did not identify which of the two actually uttered the request for all respondent's records, but I infer that Mr. Gentry made the request since (i) Mr. Gentry was the senior and more experienced investigator, and (ii) he was from the marketing practices side of the office, which made the determination that the investigation should be conducted. But even if Mr. Kostelecky made the request, Mr. Gentry's testimony as to what Mr. Kostelecky requested would not have been hearsay since it would have been offered only to show that Mr. Kostelecky made the request; not to show the truthfulness of what Mr. Kostelecky said. *See* 6 Wigmore, *Evidence* § 1766 (Chadbourn rev. 1976).

Moreover, Mrs. Manson testified that she gave the investigators everything they asked for, including the scale tickets and worksheets. Specifically, she testified (Tr. 137, 285):

Q. Mrs. Manson, you have gone over these various accounts with auditors and Department of Agricultural men. When did you first go over and where?

A. They had called me up at the office and I could not give you the date, and asked to look at our books which they were told they could. I believe it might have been the

next day or the day after, Mr. Gentry and Kastelecki came to our office. They asked to have records of purchases and sales, scale tickets and they were given all the information and records they asked for. They took them to N.D. Harrison office.

Q. Who is N.D. Harrison?

A. The certified public accountant there at Pittsfield.

Q. How long did they keep them?

A. Two or three days.

* * * * * * *

Q. Mrs. Manson, we have looked at several work sheets today and yesterday. Were any of those work sheets provided to the Government before the complaint was filed in this case?

A. Everything was provided to the Government people that was asked for. They were in with the scale tickets.

Q. My question was, were the work sheets that we have seen in the record provided to the Government before the complaint was filed?

A. When they came to audit the books, yes. The scale tickets were in a box along with the work sheets, and they were provided to them. So, my answer is, yes.

Q. And you would have a similar answer for scale tickets, that is, all of the scale tickets which we have seen—which appear in the record—were made available to the Government before the complaint was filed in this case?

A. If you are meaning, when they came to audit us, yes, if that is when you are meaning.

Q. Right, O.K. . . .

Accordingly, the real issue is not whether the scale tickets and worksheets were requested—that seems to be admitted by Mrs. Manson—but, rather, whether she provided them to the investigators and they did not see them.

It should be noted that if the investigators had seen the worksheets, even out of order, or misfiled, they would easily have known which transactions they went with since each worksheet

has the customer's name written at the top, and all the worksheets except for Transactions 6 and 12 are dated.

Similarly, they would easily have known what scale tickets went with each invoice since the invoice numbers are written on the back of the scale tickets for each transaction except Transaction 14.[126] In addition, the customer's name and date are written on each scale ticket.

Hence if the scale tickets for Transactions 1-7, and 9, or any of the worksheets had been provided to complainant's investigators, it would have been virtually impossible for them to have missed them.

Respondent's attorney, aided by the clever, but spurious, chart set forth in § IX(A) above, argues that the scale tickets were found when Mr. Gentry did the investigation but not when Mr. Kostelecky did the investigation. His argument breaks down, however, when it is remembered that Mr. Kostelecky made no photocopies of Transactions 1 through 9 during his mid-October 1978 visit. All of the photocopies of the documents taken from respondent's records relating to Transactions 1-9 were made at the time of Mr. Gentry's investigation on January 29, 1979 (and the 2 or 3 days thereafter that they had the documents (Tr. 137)). Hence, there was no more reason for Mr. Gentry to miss the scale tickets for Transactions 1-9 than there was for him to miss any of the other documents relating to Transactions 1-9.

On January 29, 1979 [illegible]

ultimate weight was arrived at. It would be as difficult for an experienced marketing specialist to miss the worksheets as it would be for a visitor visiting the Sistine Chapel to miss Michelangelo's paintings on the ceiling.

Since it would have been realistically impossible for Mr. Gentry to have missed all the scale tickets in Transactions 1-7, and 9 (there were no scale tickets in Transaction 8), and all the worksheets in the 13 transactions where worksheets were later produced at the trial, the issue is really a question of credibility. Was Mr. Gentry telling the truth when he testified that they asked for "all of his records, that had to do with his livestock dealing transactions," and that none of the worksheets were provided, and many of the scale tickets were not provided (Tr. 19-20), or was Mrs. Manson telling the truth when she testified that she gave them everything they asked for, and that "the scale tickets were in a box along with the worksheets, and they were provided to them" (Tr. 285).

The ALJ, who saw and heard the witnesses testify, determined that Mr. Gentry was a very credible witness, and that Mrs. Manson and respondent were not. The ALJ states that the "testimony that the worksheets were provided to the auditor and the livestock marketing specialist during the investigation is flatly incredible and unpersuasive" (Initial Decision and Order on Remand at 34). His conclusion in this respect is based in substantial part on Mrs. Manson's demeanor.

The ALJ's comments as to the credibility of the witnesses are intermingled with his reasons for not drawing an adverse interest against complainant for not calling Mr. Kostelecky as a witness, which I adopt. In addition to the fact that Mr. Kostelecky was not an important witness for complainant to call, since he played only a very minor role in the investigation, I infer that he was either no longer employed by complainant, or at least he was no longer employed at complainant's office in Springfield, Illinois, where the hearing was held. Mr. Gentry referred to "Jeff Kastelecki, who *was* an auditor at our office at that time" (Tr. 16; emphasis added).

Specifically, the ALJ's comments, which I adopt, are as follows (Initial Decision and Order on Remand at 17, 28-36, 39):

> The cross examination of her [Mrs. Manson] had several examples where she stonewalled, evaded or dodged responses to questions which had only one possible response.
>
> * * * * * * *

Superimposed on this are serious credibility problems arising from both demeanor and substance of the testimony of Respondent's bookkeeper as well as Respondent Saylor himself.

On this record, no serious question or doubt exists concerning the competency, integrity or credibility of Complainant's livestock marketing specialists [*i.e.*, Mr. Gentry and Mr. Riley (who conducted part of the investigation in Missouri and Kansas, Tr. 28)] who conducted the investigation and testified at the hearing.

The auditor who audited the financial record did not testify. It was suggested that this failure should be the basis for an adverse inference against Complainant.

An adverse inference does not seem appropriate. The financial record phase was not the source of any problems. The controversy stems solely from the trade practices, an incidental aspect, to be spot checked by the financial auditor on his first visit. When that cursory check indicated problems may exist, a deeper detailed inspection of the records was made on two subsequent trips to Respondent's Pittsfield offices by the livestock marketing specialist who testified, accompanied and assisted by the auditor who did the financial audit.

There is no clear basis on this record to assess the division of activities or the relationships between them, but the clear impression existed that the testifying livestock marketing specialist was the senior of the two and the one in charge of the trade practices phase of the investigation.

His testimony was clear, comprehensive and persuasive. The subject seemed to be fully and persuasively covered. No nagging doubts or questions remained. No unexplained, suspicious or peculiar circumstances existed. The evidence is not probatively weak. There is no apparent reason to discount the livestock marketing specialist testimony. He was present throughout the trial and was recalled for rebuttal testimony.

The record does not show any "peculiar" knowledge [14] on the part of the auditor who was sent to audit Respond-

[14] "Furthermore, it seems plain that possible witnesses whose testimony is for any reason comparatively *unimportant*, or *cumulative*, or *inferior* to what is already

Continued

ent's financial record, concerning the trade practices problems, that was not easily available to Respondent. The work was done on records given by Respondent to the investigators, in consultation with Respondent and his bookkeeper.

Had any contemporaneous problems or objections arisen at the hearing, Complainant would have been requested to present the financial auditor for examination or a subpoena would have been issued for his appearance, on request by Respondent. Never has Complainant been known to refuse to honor a request from the opposing party, or from the Judge, to produce an investigating witness, on timely request.

The adverse inference rule is considered an aid utilized when the evidence is being evaluated and weighed. In the event of doubt, question, mysterious, peculiar or suspicious circumstances that are not otherwise satisfactorily answered or resolved by the record, the trier of fact may draw an inference against the party who had control of the evidence that was not produced or offered.

This principle should not be broadened to require that every eyeball witness be produced at risk of having an adverse inference drawn. Administrative law processes

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utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved. This limitation should not be enforced with any strictness; otherwise it would become practically objectionable; but on principle it is sound, and has often been recognized:[2]

'1885, Stone, C.J., in *Carter* v. *Chambers*, 79 Ala. 223, 224, 231 (disapproving a charge that 'if a party has a witness within his power to produce, and fails to produce him, the presumption is fair that the witness if produced would not support the right of the party'); 'Carried to its extent, it would require of a suitor that he should produce all the witnesses, no matter how numerous they might be, who knew anything of the transaction . . . . There is a rule, and just one, that if a party has a witness possessing a peculiar knowledge of the transaction, and supposed to be favorable to him, and fails to produce such witness when he has the means of doing so, this, in the absence of all explanation, is ground of suspicion that such better-informed testimony would make against him.' "

(Section 287, Wigmore on Evidence, Third Edition (1940); (emphasis in the original). [End of ALJ's footnote 14.]

should not be burdened in this way, with the redundancy that would result.

Under proper circumstances, not seen here, an adverse inference would be drawn, knee jerk utilization of the adverse inference rule should he avoided.[15] A simple evidentiary conflict should not automatically trigger it.

Respondent's bookkeeper angrily described a personality conflict with Complainant's auditor and livestock marketing specialist, indicating that they were uninformed, domineering and deaf to her explanations. Based both on the substance of her testimony and her testimonial demeanor, her credibility is weak and doubtful.[16]

She is not a shrinking violet. She says what she wants to say when she is angry and when she wants to say it. She is not easily pushed around.

At times, under cross examination (which was not hostile in tone or manner, and not intimidating in style, but was surgical in technique), she was stubbornly unresponsive, quickly tangental and angrily upset at times. By stoney, cold, long pauses, she indicated difficulty with simple, precise questions. Points on cross examination were not persistently pursued because her demeanor clearly indicated that it would be fruitless—dancing around the mulberry bush. She hedged and dodged for no apparent reason, to specific, simple questions, when the answer seemed obvious and unavoidable.

On direct examination she fared well on generalized friendly questions showing both confidence and detailed knowledge, but on cross examination she significantly backtracked, qualified, withdrew and displayed distress when specific points were the subject of focus (as opposed to generalized testimony she had confidently given earlier).

It is difficult to see her cowering before "overbearing" P&SA inspectors, as she suggests.

Further, from the testimonial demeanor of the livestock marketing specialist who dealt directly with her and Re-

[15] On remand, both parties had the opportunity to reopen the record to present additional evidence. Neither saw fit to do so.

[16] The contemporaneous doubt about her credibility is renewed and refreshed on re-examination of the transcript.

spondent Saylor, it appears unlikely that he would be argumentative, domineering or overbearing. It did not seem to be in character for him. He appeared to be quiet, comfortable, competent and knowledgeable, so he could make his inquiries and seek cooperation or work as best as he could without cooperation.

Respondent's bookkeeper testified that she gave the key "worksheets" to the P&SA inspectors in a box along with scale tickets. This was denied on rebuttal testimony. Further, the livestock marketing specialist said that none of the worksheets and most of the scale tickets presented as exhibits at the hearing had not been seen before they were presented as proposed exhibits. This testimony is persuasive and convincing.

The testimony that the worksheets were provided to the auditor and the livestock marketing specialist during the investigation is flatly incredible and unpersuasive. The livestock marketing specialist is a thoroughly experienced man. This is his lifetime occupation. He is without bias or prejudice, or any basis for it, on this record. He has no apparent axe to grind or benefit to be gained.

It is exceedingly unlikely that a livestock marketing specialist with over two decades of experience in livestock marketing and records would overlook "worksheets" with mathematical computations and notations concerning cattle, pens, etc., where the calculations begin with the invoiced weight at purchase by Saylor and end with invoiced weights on sale by Saylor, in these 14 transactions.

The purpose of the investigation was to follow the paper trail to see if Respondent Saylor had properly transferred purchase weights to his purchaser.

The paper trail could not be fully traced or understood without the worksheets. Worksheets with calculations involving the purchase and sale weights would have inevitably led to questions and explanations about sorting in these particular transactions. This is true even if weight transfers were not already the primary focus of suspicion.

With weight transfers being the focal point of the investigation on the second and third visit to Respondent's offices, it is even more probable that questions would be presented to Saylor and his bookkeeper about the meaning of

the calculations and notes on the worksheets. They could not be overlooked. Receiving them in the same box with "some" scale tickets relating to the transactions would make it even more probable that such inquiries would be made.

No inquiry was made by the investigator for the simple reason that he never saw them until the time of trial.

Failure to inquire about these documents, if they had ever been in his hands, could only be explained by incompetence or strong bias against the Respondent. The record fails to show any basis for either of these possibilities. A personality clash, if it occurred, between Respondent's bookkeeper and the investigator(s) is not sufficient to justify such a disproportionate reaction here.

* * * * * * *

Respondent's evidence is weakened by serious credibility problems on the part of both Respondent Saylor and his bookkeeper.

Respcndent testified that at the final meeting in complainant's Springfield, Illinois, Regional Office, he had some information in his pocket that was offered and not accepted. He testified (Tr. 300-02):

Q. You had an auditor call upon you to go through your books?

A. Yes, sir.

Q. What was done when the auditor came to go through your books?

A. If I recollect, he come and got our books and took them in town someplace. I forget where it was at.

Q. Was that the Noble Harrisons?

A. I believe possibly it could have been, yes, sir.

Q. Did he come back and have a conversation with you in regard to the examination of the books, or anyone?

A. I don't know whether he did at that time or not. I can't recall.

Q. Well, then, did he come back and get your books a second time?

A. Yes, sir.

Q. Where did they take them that time?

A. I believe the Green Acres Motel, I believe it was.

Q. Now, did you go down to the Green Acres Motel, y and Mrs. Manson, and have a discussion with them at tl time?

A. Yes, sir.

Q. Did you make explanations at that time on varic transactions that they were questioning?

A. We tried to.

Q. Would they listen to you?

A. Well, I wouldn't hardly know how to answer that didn't feel that they did.

Q. Did they, then, ask you to come to Springfield, Il nois, for a conference?

A. I believe so, yes, sir.

Q. I went with you to that conference?

A. That's right, sir, you did.

Q. Now, at that time, at the conference, did you disclo all of the information that has been disclosed by Mrs. Manson in her testimony?

A. Yes, sir, I had some information with me in my pocket that I offered. They did not accept it.

I give no weight to that testimony for four reasons. First, respondent did not testify that he showed complainant's officials what he had in his pocket.

Second, respondent did not state under oath what the nature of the information in his pocket was. Respondent's attorney argues that respondent was talking about the scale tickets. Specifically, respondent's attorney states (Respondent's Reply To Complainant's Response To Appeal at 8):

> Q. Now, at that time, at the conference did you disclose all of the information that has been disclosed by Mrs. Manson in her testimony?
>
> A. Yes, sir. *I had some information with me in my pocket that I offered. They did not accept it.* (Tr. 301–302.) (empha-

sis added [by respondent's attorney]) (Author's note [*i.e.*, respondent's attorney's note]: Saylor must have been talking about the scale tickets, which would fit into a pocket.)

However, there is no testimony as to the nature of the information in respondent's pocket.

Third, even if respondent had testified that at the final conference in Springfield, Illinois, he had with him the scale tickets and worksheets for all of the transactions,[128] that would not alter my inference that the worksheets were not in existence at the time of the January 29, 1979, visit since respondent had several months in which to fabricate the worksheets. (The investigators advised respondent and his bookkeeper as to the transactions they were questioning during the prior meetings (Tr. 8-9, 20, 137-40, 301)).

Fourth, I note that respondent's testimony as to his "pocket information" is inconsistent with Mrs. Manson's testimony (Tr. 137, 285), quoted above, that she gave complainant's investigators all the worksheets and scale tickets when they requested respondent's records. Respondent knew that complainant's investigators had requested all of his records. If respondent believed that Mrs. Manson had already given them all of the scale tickets and worksheets, why would he have tried to offer them at the Springfield meeting? His "pocket information," thus, is a "pocket veto" of her testimony!

For the foregoing reasons, I find that neither Mrs. Manson nor respondent furnished to complainant's investigators any of the worksheets involved here, or any of the scale tickets for Transactions 1-7, and 9, when all of respondent's records were requested on January 29, 1979. And I draw no adverse inference against complainant for not calling Mr. Kostelecky as a witness.

C. I Infer that the Scale Tickets for Transactions 1-7, and 9 Were Not Furnished to the Department's Investigators Because They Would Have Prompted the Investigators to Ask for Nonexistent Worksheets. The Scale Tickets that Were Furnished (for Transactions 10-14), All Made After Kostelecky's Mid-October 1978 Visit to Respondent, Were "Sanitized."

We now come to the question as to why respondent and his bookeeper did not supply the scale tickets for Transactions 1-9 (except

[128] There is no suggestion in the record or even in respondent's briefs that respondent or Mrs. Manson had scale tickets or worksheets in their pocket at any of the earlier meetings, and that they tried to offer them. Respondent and Mrs. Manson testified only that they tried to *explain* their activities at the earlier meetings.

Transaction 8, in which there was no scale ticket) when the Department's investigators requested all his records, including scale tickets, on January 29, 1979. Contrary to respondent's briefs, the Department has never contended that those scale tickets (as distinguished from the worksheets) were not in existence when requested on January 29, 1979. Complainant's attorney has consistently explained that the scale tickets had to be prepared at the same time as the invoices because the scale tickets are serially numbered and have to be used in the proper order.

In fact, complainant argued, and the ALJ and I have inferred, that in Transactions 10, 11, and 13, when respondent apparently got behind in preparing phony scale tickets, and did not prepare them until 1 to 4 days after the fact, respondent's bookkeeper completely rewrote the invoices for those dates, changing the invoice dates to correspond with the dates on the phony scale tickets. The fraud could only be detected if an investigator happened to see the original copy of the invoices for Transactions 10, 11, and 13, showing the true date of the transactions (see § XVII, *infra*).

Why, then, did respondent and his bookkeeper refuse to supply the scale tickets for Transactions 1-7, and 9 to the investigators on January 29, 1979? I infer that the earlier scale tickets were not supplied because each of the earlier scale tickets would have prompted the P&S investigators to look for worksheets. On the other hand, none of the scale tickets for Transactions 10-14, which were furnished, would have prompted such an inquiry.

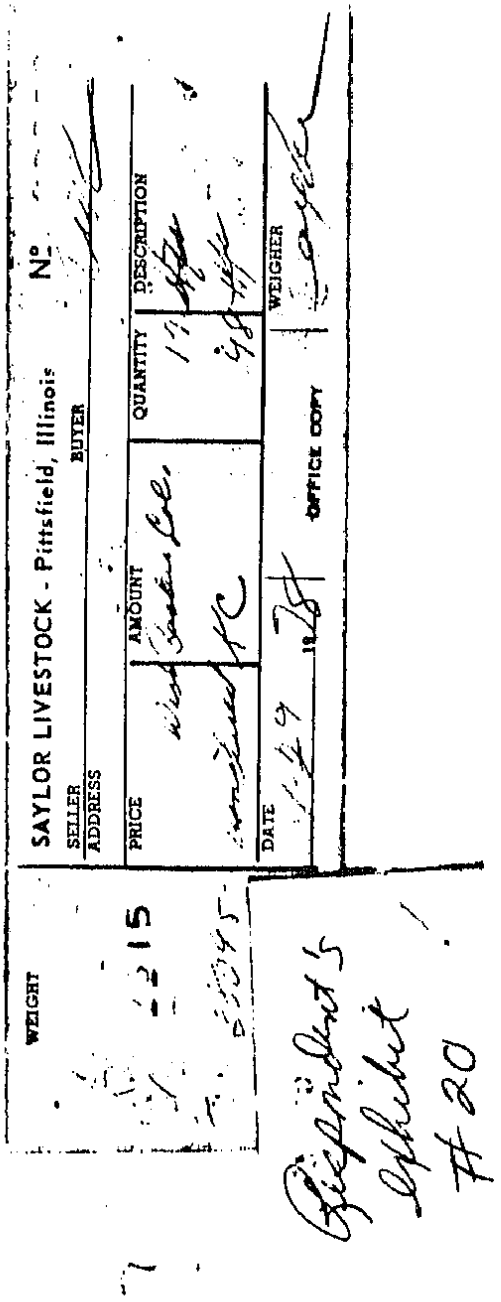
If we examine the scale tickets in the light of the chart conveniently prepared by respondent's attorney, set forth in § IX(A), *supra*, and replace the heading "Did Auditor 'Find' Scale Tickets?" with "Would the Scale Tickets Have Prompted the Investigators to Look for Worksheets?" every "No" on the chart would be replaced with "Yes," and every "Yes" (*i.e.*, for the last five transactions after Mr. Kostelecky's mid-October visit) would be replaced with "No." This offers further support for my inference that the worksheets were not in existence on January 29, 1979, when the investigators asked for all of respondent's records relating to the livestock transactions, and that in order to avoid prompting the investigators to ask for nonexistent worksheets, respondent took a calculated risk and did not supply the scale tickets that would have prompted the investigators to ask for worksheets.

The scale ticket for Transaction 4 (RX 26), reproduced in § I(B), *supra*, shows that "955" pounds was added to the printed weights (specifically, "33-29# Per Hd" (JO Ref. 69, 70, 71, p. 32) (33 $\times$29 = 957, which rounds to 955). The scale ticket for Transaction 6 (RX 34), reproduced in § IV(B), *supra*, shows that "400" pounds of "Pro

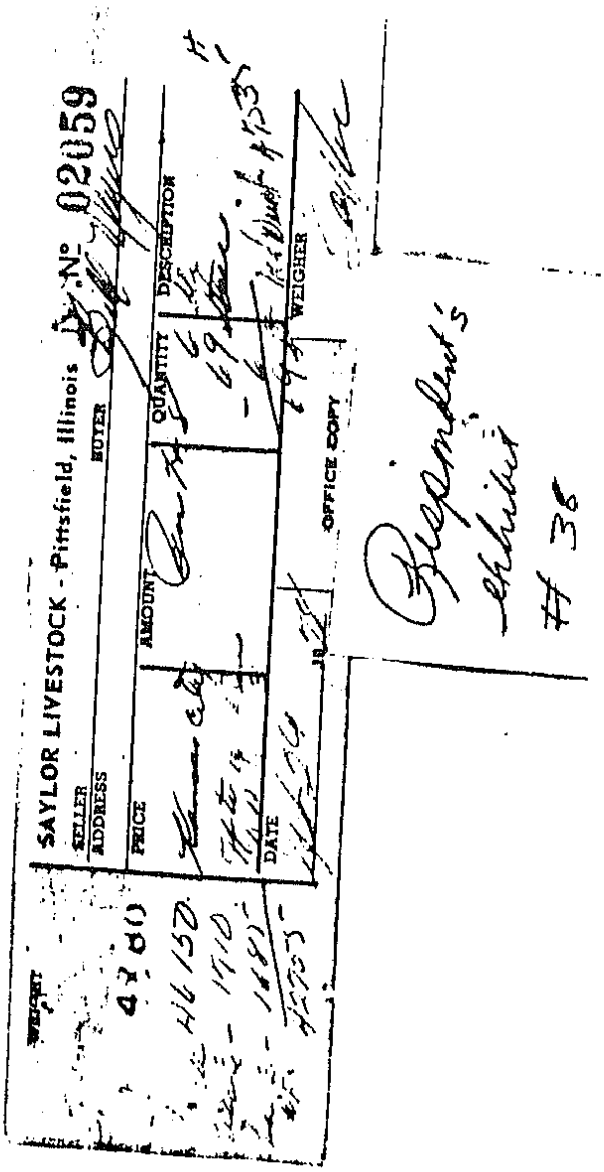
Rate" was added (specifically, "16 hd Springfield-+25# Per Hd") (JO Ref. 225-227, p. 199). Both scale tickets would have shouted to the investigators, "WHERE'S THE WORKSHEETS?"

The scale tickets for Transactions 3 (RX 20) and 7 (RX 38) are reproduced on the next page.

Transaction 3 Scale Ticket (RX 20)


SAYLOR LIVESTOCK - Pittsfield, Illinois
No.
WEIGHT
SELLER
BUYER
ADDRESS
PRICE
AMOUNT
QUANTITY
DESCRIPTION
DATE
WEIGHER
OFFICE COPY
Defendant's Exhibit # 20

Transaction 7 Scale Ticket (RX 38)



SAYLOR LIVESTOCK - Pittsfield, Illinois

No. 02059

SELLER
ADDRESS
BUYER

PRICE | AMOUNT | QUANTITY | DESCRIPTION

DATE | WEIGHER

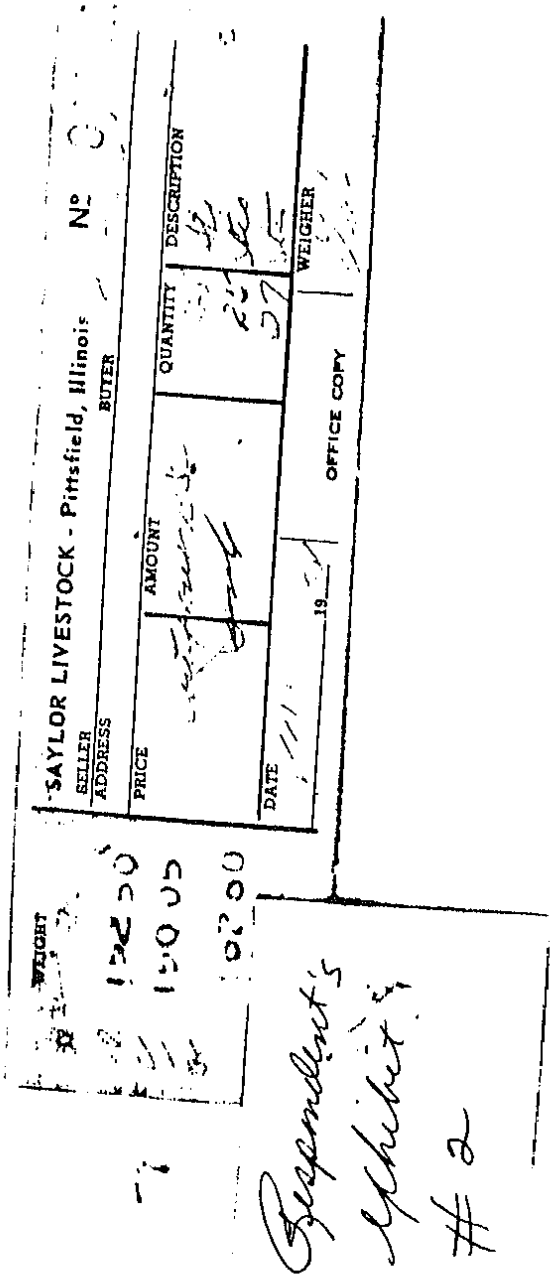
OFFICE COPY

Respondent's Exhibit #38

These scale tickets, which show only 7,615 and 4,780 pounds of printed weight, and additional amounts of weight added in pencil of 38,095 pounds and 42,755 pounds, respectively, would also have shouted to the investigators, "WHERE'S THE WORKSHEETS?"

The remaining four scale tickets not furnished to complainant's investigators, for Transactions 1 (RX 2), 2 (RX 6), 5 (RX 31), and 9 (RX 49) are reproduced on the next two pages.

Transaction 1 Scale Ticket (RX 2)



SAYLOR LIVESTOCK - Pittsfield, Illinois

№

SELLER
ADDRESS
BUYER

PRICE
AMOUNT
QUANTITY
DESCRIPTION

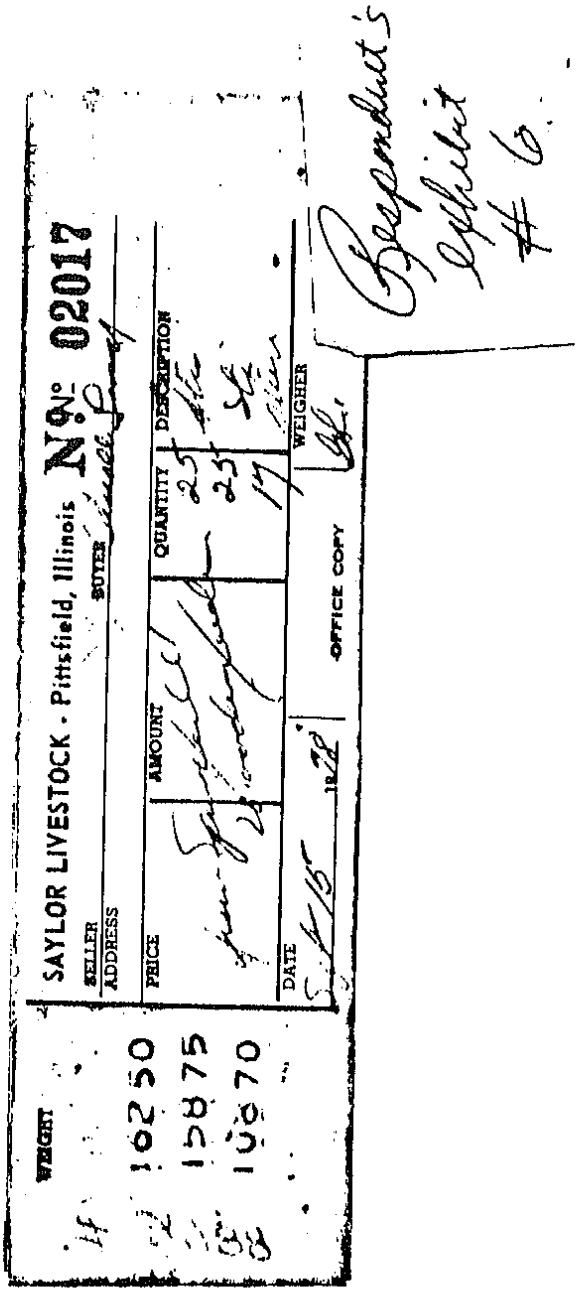
DATE
19

OFFICE COPY

WEIGHT
WEIGHER

Respondent's Exhibit #2

Transaction 2 Scale Ticket (RX 6)



SAYLOR LIVESTOCK - Pittsfield, Illinois No. 02017

SELLER
ADDRESS
BUYER

WEIGHT	PRICE	AMOUNT	QUANTITY	DESCRIPTION
16250			25	
15875			25	
10070			17	

DATE 18 78

WEIGHER

OFFICE COPY

Respondent's Exhibit # 6.

Transaction 5 Scale Ticket (RX 31)

SAYLOR LIVESTOCK - Pittsfield, Illinois

SELLER
ADDRESS
BUYER

No. 02039

WEIGHT	PRICE	AMOUNT	QUANTITY	DESCRIPTION
1345	Sold at 65 cc		21	Steers
1310	46 cc		52	Steers

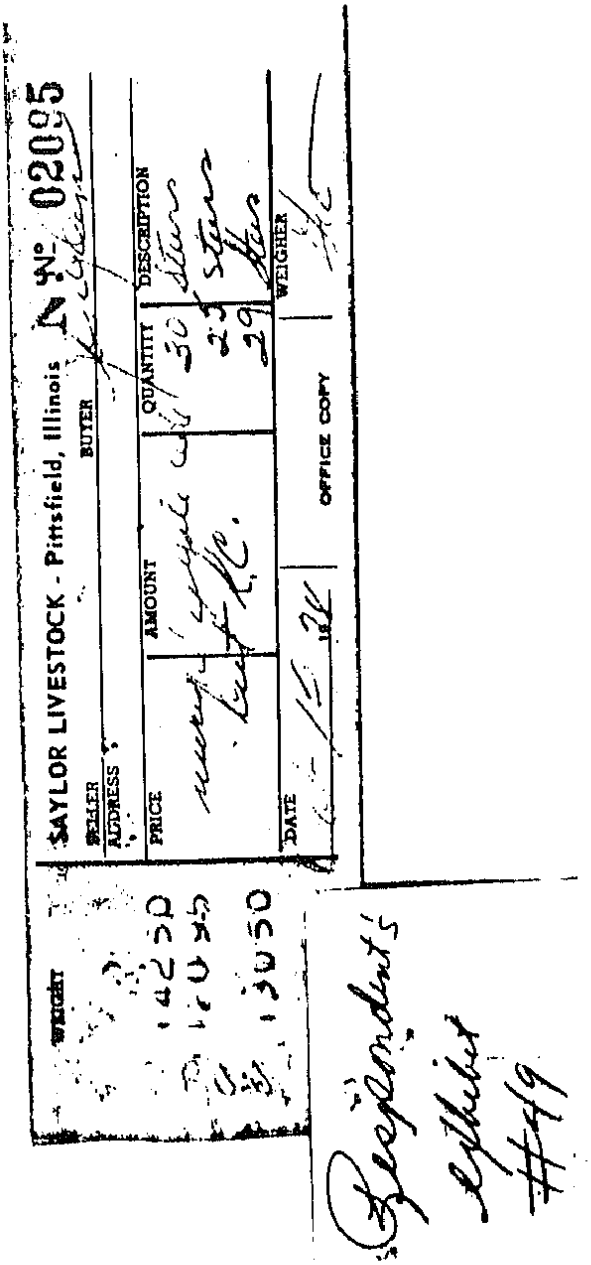
DATE 19

OFFICE COPY

WEIGHER

Respondent's Exhibit #31

Transaction 9 Scale Ticket (RX 49)



SAYLOR LIVESTOCK - Pittsfield, Illinois

No. 02095

SELLER
ADDRESS
BUYER

WEIGHT	PRICE	AMOUNT	QUANTITY	DESCRIPTION
1425			50	Steers
1035			23	Steers
1050			29	Steers

DATE 12-2-91

OFFICE COPY

WEIGHER

Respondent's Exhibit #49

Although the printed weight on each of these four scale tickc exactly equals the weight invoiced to the buyer, and no weight added in pencil, there is enough language on each of these foı scale tickets to suggest to a suspicious-minded P&S investigatc that further inquiry should be made as to these transactions.

For example, the scale ticket for Transaction 1 mentions "sortc out KC" and "Pen 6," which is one of respondent's pens fror which livestock would be taken from inventory (Tr. 209). The scal ticket for Transaction 2 mentions "from Springfield" and "Wooden feeder," which is another one of respondent's pens from which livc stock would be taken from inventory (Tr. 145–46). The scale ticket for Transaction 5 shows "sorted out," and lists two different lot numbers from Kansas City. The scale ticket for Transaction 9 refers to "gate cut" and "cut KC." Each of these four scale tickets would have raised enough questions in the mind of a suspicious P&S investigator to prompt further inquiry.

Turning now to the scale tickets for Transactions 10–14, which were prepared after Mr. Kostelecky's mid-October 1978 visit to respondent,[129] and which were supplied to complainant's investigators on January 29, 1979, we see a striking contrast. The scale tickets for Transactions 10 (RX 53, 54), 11 (RX 59, 60), 12 (RX 64), 13 (RX 69–71), and 14 (RX 75–79) are reproduced on the following six pages.

Transaction 10 Scale Tickets (RX 53, 54)

WEIGHT
14905

SAYLOR LIVESTOCK - Pittsfield, Illinois No.
SELLER BUYER
ADDRESS
PRICE | AMOUNT | QUANTITY 21 | DESCRIPTION cr
DATE 10-30 19 28 | OFFICE COPY | WEIGHER

Respondent's exhibit # 53

WEIGHT
10350
13965

SAYLOR LIVESTOCK - Pittsfield, Illinois No. 02127
SELLER BUYER
ADDRESS
PRICE | AMOUNT | QUANTITY 23 19 | DESCRIPTION stw otw
DATE 10-30 19 28 | OFFICE COPY | WEIGHER

Respondent's exhibit # 54

Transaction 11 Scale Tickets (RX 59, 60)

WEIGHT

SAYLOR LIVESTOCK - Pittsfield, Illinois

SELLER
ADDRESS
BUYER

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		25	Strs

DATE 11-7 28

OFFICE COPY

WEIGHER

Respondent's Exhibit #59

WEIGHT

SAYLOR LIVESTOCK - Pittsfield, Illinois

SELLER
ADDRESS
BUYER

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		27	Strs
		27	Strs

DATE 11-7 28

OFFICE COPY

WEIGHER

Respondent's Exhibit #60

Transaction 12 Scale Ticket (RX 64)

WEIGHT

Respondent's Exhibit # 64

SAYLOR LIVESTOCK - Pittsfield, Illinois No.

SELLER BUYER

ADDRESS

PRICE	AMOUNT	QUANTITY	DESCRIPTION

DATE 19 OFFICE COPY WEIGHER

Transaction 13 Scale Tickets (RX 69, 70, 71)

WEIGHT
19550

Respondent's Exhibit #69

SAYLOR LIVESTOCK - Pittsfield, Illinois № [illegible]
SELLER [illegible] BUYER [illegible]
ADDRESS
PRICE | AMOUNT | QUANTITY 26 | DESCRIPTION Str
DATE 11-30 18 | OFFICE COPY | WEIGHER

WEIGHT
18680
18475

Respondent's Exhibit #70

SAYLOR LIVESTOCK - Pittsfield, Illinois № [illegible]
SELLER [illegible] BUYER [illegible]
ADDRESS
PRICE | AMOUNT | QUANTITY 25 Str, 25 Str | DESCRIPTION
DATE 11-30 18 | OFFICE COPY | WEIGHER

WEIGHT
18595
18845

Respondent's Exhibit 71

SAYLOR LIVESTOCK - Pittsfield, Illinois № [illegible]
SELLER Saylor BUYER Jones
ADDRESS
PRICE | AMOUNT | QUANTITY 25 Str, 27 Str | DESCRIPTION
DATE 11-30 18 | OFFICE COPY | WEIGHER

Transaction 14 Scale Tickets (RX 75, 76, 77)

WEIGHT
1540
125

SAYLOR LIVESTOCK - Pittsfield, Illinois №
SELLER BUYER
ADDRESS
PRICE | AMOUNT | QUANTITY | DESCRIPTION
32
32
DATE 13-3 19 28 | OFFICE COPY | WEIGHER EdS.

Respondent's Exhibit #75

WEIGHT
35

SAYLOR LIVESTOCK - Pittsfield, Illinois №
SELLER BUYER
ADDRESS
PRICE | AMOUNT | QUANTITY | DESCRIPTION
DATE 12-2 19 28 | OFFICE COPY | WEIGHER

Respondent's Exhibit #76

WEIGHT
1510
1250

SAYLOR LIVESTOCK - Pittsfield, Illinois № 03349
SELLER BUYER
ADDRESS
PRICE | AMOUNT | QUANTITY | DESCRIPTION
25
25
DATE 12-2 19 28 | OFFICE COPY | WEIGHER

Respondent's Exhibit 77

Transaction 14 Scale Tickets (RX 78, 79)

WEIGHT

11165
11610

Respondent's Exhibit #78

SAYLOR LIVESTOCK - Pittsfield, Illinois No.

SELLER
ADDRESS
BUYER

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		65	Hogs
		65	Hogs

DATE 15-2 1978
OFFICE COPY
WEIGHER

WEIGHT

95 55

Respondent's Exhibit #79

SAYLOR LIVESTOCK - Pittsfield, Illinois No.

SELLER
ADDRESS
BUYER

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		61	Hogs

DATE 15-2 1981
OFFICE COPY
WEIGHER

Not one of the scale tickets in Transactions 10-14, which were furnished to complainant's investigators, would have raised the slightest question in the minds of even the most suspicious-minded P&S investigator. They are as "clean" as the proverbial "hounds tooth." The scale tickets for each of Transactions 10-14 print the exact amount of weight invoiced to the buyer, without a single word of explanation on the scale tickets.[130]

A comparison of the scale tickets in Transactions 10-14 with those issued by respondent prior to Mr. Kostelecky's mid-October 1978 visit shows clearly that the latter scale tickets, furnished to the investigators, would have raised no questions as to the existence of worksheets, whereas the earlier scale tickets would have instantly alerted the investigators to the fact that they should ask for worksheets. I infer that respondent and his bookkeeper did not furnish the earlier scale tickets to the investigators so that they would not be prompted to ask for nonexistent worksheets.

D. I Infer that the Worksheets Were Not Furnished on January 29, 1979, When Complainant's Investigators Requested All of Respondent's Records Because They Were Not Then in Existence.

Respondent was required by the Act and regulations to keep accurate records of all his transactions and to make them available to the Department's investigators (7 U.S.C. §§ 221, 222; 15 U.S.C. §§ 46, 48-50; 9 CFR § 201.95). Since all of respondent's records dealing with the livestock transactions involved here were requested by the investigators at their January 29, 1979, visit, but none of the vital worksheets for these transactions were supplied (see § IX(B), *supra*), I infer that they were not supplied because they were not in existence at that time. There is no reasonable explanation why respondent would have failed to supply them if they had been in ex-

[130] A number of these scale tickets are in Mrs. Manson's handwriting, but she testified that she filled out the writing on scale tickets weighed by others (Tr. 283). The record does not show whether all of the scale tickets furnished to the investigators, for transactions occurring after Mr. Kostelecky's mid-October 1978 visit to respondent that were not alleged as violations, were as "sanitized" as the scale tickets for Transactions 10-14. I infer that they were, since there is no evidence that the investigators were prompted to ask *specifically* for worksheets. But even if they were not, they either related to legitimate transactions, or at least there was no indication that they related to fraudulent transactions. Otherwise, additional transactions would have been alleged as violations.

istence. They were essential to his version of the facts.[131] As the ALJ states in his Decision and Order on Remand at 23:

> These "worksheets" were not made available to the P&SA investigators at the time of their investigation. The "worksheets" were first produced as proposed exhibits.
>
> To fail to provide these worksheets to Complainant's investigators checking cattle weight transfers is to fail to tell your cardiologist about chest pains.
>
> The worksheets constituted the vital and key link to connect incoming and outgoing shipments of cattle. Saylor was to sell at his "purchase weights" but Saylor's sales here were all at greater weights than the purchase weights. Only the worksheets could begin to explain these weight increases.
>
> The sale weight was either a padded weight or the result of sorting with heavier cattle replacing lighter cattle.
>
> Saylor and his bookkeeper knew, or should have known, that the worksheets were vital and essential documents that had to be produced when cattle transactions were being traced. Yet, they were not provided to the investigators at the time of the audit.[13]
>
> [13] The evidence indicating that these worksheets were produced is unpersuasive and incredible for reasons discussed later. [The ALJ's reasons referred to are quoted above in § IX(B).]

If the question is raised as to why respondent, if he were going to fabricate worksheets, would not have fabricated them between the time of Mr. Kosteleeky's mid-October 1978 visit and January 29, 1979, the answer is that it would have been an enormous undertaking. Respondent was on the road buying livestock about half of the week (Tr. 180). He engaged in about 300 livestock transactions during the period in question (Appeal from Judges Decision filed October 6, 1982, at 2). Fabricating a worksheet for even one transaction is a major undertaking. The "in-weight" would have to be carefully determined in a manner that the per-head shrink would appear reasonable. Reasonable weights would have to be given to the animals removed and to the animals added (respondent was

[131] I do not draw the same inference as to the scale tickets because, as shown immediately above in § IX(C), there is a reasonable and logical explanation for respondent's failure to provide the scale tickets for Transactions 1–7, and 9, even though they were in existence.

forced, by the amount of added weight, to make unreasonable claims in this respect in Transactions 7, 11, and 13).

In fabricated worksheets, all of the calculations would have to be mathematically sound leading to an end result exactly equal to the amount of weight arbitrarily added by pencil (respondent made slips there in Transactions 2, 5, and 8), and be consistent with the fabricated scale tickets (respondent made a major slip there in Transaction 6). Also, respondent would have to be sure that his worksheet and other records did not sell the same animals to two different persons (another slip by respondent, in Transaction 4). Accordingly, it would have been too much of a chore to attempt to fabricate all of the necessary worksheets before respondent knew the exact transactions at issue.

Even though the investigators told respondent of particular transactions questioned, if respondent had produced worksheets for those transactions at the final Springfield conference, and the investigators then requested others, and offered to accompany him back to Pittsfield to copy them, respondent would have been in serious difficulty. Accordingly, I infer that respondent took the most reasonable approach, *i.e.*, he waited until the complaint was issued before he fabricated the worksheets introduced in this proceeding. But it is only important that I infer that the worksheets were not in existence on January 29, 1979, when all of respondent's records were requested.

In reaching the inference that the worksheets were not in existence on January 29, 1979, I rely not only on the fact that the worksheets were not produced when all of the records were requeste but also on the circumstances discussed in § IX(C), immediate above, relating to which scale tickets were furnished, and whi scale tickets were not furnished, to complainant's investigators. I addition, I rely on the ALJ's findings based on his determination as to the credibility of the witnesses.

If this inference is accepted as reasonable by the court, it is decisive of this case even if the court might have arrived at a different conclusion based on the court's own evaluation of the evidence. That is, if the worksheets were not in existence on January 29, 1979, that proves conclusively that respondent added an arbitrary amount of weight to the livestock in the 13 transactions at issue here where worksheets were produced (all except Transaction 14). Since this inference is decisive as to Transactions 1-13, it is, of course, relied on in each of these transactions.

X. The Trucker's Affidavit (Not Contradicted in His Testimony) Is Decisive for Complainant in Transaction 5, and the Trucker's Testimony Is Very Supportive of Complainant's Position in Transaction 4. No Truckers' Testimony Favors Respondent's Position. USDA Believes Every Word Said by Every Trucker (Taken in Context).

Respondent's attorney has stated so many times that we have rejected the testimony of the five truckers (*e.g.*, Respondent's Brief on Remand filed April 2, 1984, at 2; Respondent's Appeal to Judicial Officer filed February 25, 1985, at 15), and that "all the non-governmental witnesses favored Saylor" (*e.g.*, Respondent's Brief on Remand filed April 2, 1984, at 32) that someone might be misled into believing him. To set the record straight, I do not reject a single word said by any trucker, *taken in context.*

Five truck drivers testified. As shown in § III(C), *supra*, the affidavit of truck driver Donald D. McGlauchlen is decisive for complainant as to Transaction 5. And nothing in his testimony, taken in context, is contrary to his affidavit.

Similarly, as shown in § I(D)(3), *supra*, the testimony of truck driver Earl Richards so strongly supports complainant's position as to Transaction 4 that it would be sufficient, by itself, to support a finding for complainant as to Transaction 4.

As shown in § IV(E), *supra*, the testimony of truck driver Kenneth Bonnett as to Transaction 6 is mildly supportive of complainant's position, but it is too weak to be relied upon. However, his testimony lends no support whatever to respondent's position, *i.e.*, the fact that the truck stopped overnight in Pittsfield, which is conceded by complainant on remand, lends no support to respondent's position that 12 animals were removed. Accordingly, I give no weight whatever to Mr. Bonnett's testimony. But if I were to give it any weight, it would be in complainant's favor.

Mr. McCarthy, the owner and operator of M&I Truck Line, Inc., testified that the trip sheet for Transaction 8 (which is in Mrs. Manson's "distinctive feminine handwriting," including the origin and destination information) shows that the cattle went directly from Kansas City and Moberly to Emporia, Kansas (Tr. 105). But that is conceded by respondent. Respondent's attorney states that "Saylor . . . has always admitted that the cattle did not stop at Pittsfield in transaction number 8" (Respondent's Reply to Complainant's Response to Appeal at 3–4). Hence Mr. McCarthy's testimony is irrelevant to this case.[132]

[132] His testimony would similarly have been irrelevant even if he had testified that the truck did stop at Pittsfield enroute to the customer.

Although Mr. McCarthy initially testified on cross-examination by respondent's attorney that he charged for hauling feeder cattle by the mile, irrespective of weight (Tr. 105-06), on redirect examination by complainant's attorney, when he was shown documentary evidence (CX 8, p. 9) showing that respondent paid him for hauling feeder cattle on a per-pound basis, he testified that he was not willing to testify that the documentary evidence did not "accurately reflect the basis" on which he was paid without checking his books (Tr. 106-07). He concluded, "Why this has been figured back by the hundredweight, I don't know. I would have to check my books back against it to see" (Tr. 107).

Hence Mr. McCarthy backed away from his original statement that he was paid by the mile on feeder cattle and, therefore, his testimony, taken in context, does not support the view that in the particular transactions at issue here, he was paid by the mile. In any event, the documentary evidence here shows that respondent paid M&l Truck Line, Inc., by the pound in every transaction at issue here except Transaction 14 and part of Transaction 8 (CX 2, p. 14; CX 3, p. 13; CX 7, p. 9; CX 8, p. 9; CX 9, p. 9; CX 14, p. 21). Moreover, whether he was paid by the mile or by the pound is of no importance here.

Finally, truck driver Derald McGlauchen, called as a witness by respondent, gave no testimony relevant to this proceeding. He testified that respondent's trailers are capable of being divided into pens within the trailers, so that several lots of cattle from different owners can be placed in one trailer (Tr. 76), but that is not an issue here.

I assume he was called as a witness by respondent because at first he testified that he charged "[p]er loaded mile on livestock," irrespective of the weight (Tr. 76). However, on cross-examination, when he was shown documentary evidence (CX 1, p. 9) showing that respondent had paid him for hauling the 77 steers in Transaction 1 by the pound (Tr. 78-79),[133] he admitted "that there are at least some occasions where . . . [his firm] in the past hauled cattle for Mr. Saylor on a per pound basis" (Tr. 79). Hence his admission on cross-examination destroyed his usefulness to respondent as a witness.

In conclusion, to the extent that the truckers' testimony is relevant at all, it is supportive of complainant's position. No trucker

[133] Specifically, he was paid for hauling the exact purchase weight of Kansas City Lot No. 68 purchased by respondent the day before he sold 77 steers to the customer, at an increase in weight (CX 1, pp. 1, 6, 9).

gave one word of testimony, taken in context, helpful to respondent's case.[134]

XI. Only One Farmer's Testimony Supports Respondent's Claim (in Two Transactions) that Livestock Involved in Any of the 13 Alleged Reweighing Transactions Was Sorted or Substituted. His Testimony as to a Salient Fact Is Contradicted by Respondent, Respondent's Bookkeeper and Documentary Evidence.

As the court noted, one of respondent's customers, Gerald W. Rodhouse, "testified that he observed Saylor sort the cattle at the Pittsfield yard in a transaction [actually two transactions] challenged here" (723 F.2d at 583). I give no weight to Mr. Rodhouse's testimony for the reasons set forth below.

In Transaction 12, the problem with Mr. Rodhouse's testimony is that he not only testified that he observed and participated in sorting 21 steers purchased from respondent, but he testified that, to the best of his ability, he remembered being present when the steers arrived in Pittsfield (Tr. 49). He testified (Tr. 49-50):

> Q. Now calling your attention to November 18, 1978, do you recall of obtaining 21 steers from Mr. Saylor?
>
> A. Yes, sir.
>
> Q. Were you present when those steers arrived in Pittsfield?
>
> A. To the best of my ability, yes, I'm remembering that.
>
> Q. Did you assist or supervise the removal of certain animals from that lot?
>
> A. Yes, sir.
>
> Q. As a matter of f[illegible]

Q. When those animals were removed, the cripples and the horned animals were removed, were they replaced with other animals from Mr. Saylor's lot?

A. Yes, sir.

Mr. Rodhouse was paying respondent $8,629.30 for the 21 steers (RX 66). The arrival of the truck with his livestock would have been a noticeable event. There is always noise and commotion when a livestock truck arrives and is unloaded. Hence Mr. Rodhouse's testimony that he remembered, to the best of his ability,[135] that he was present when the 21 steers arrived is a salient fact, which, if proven false, destroys his credibility as to this transaction (not that he was intentionally lying—just that he was mistaken as to which transaction he remembered).

Respondent's invoice to the customer shows that respondent sold the 21 steers to Rodhouse Bros., Pleasant Hill, Illinois, on November *18*, 1978 (RX 66). The scale ticket is dated November *18*, 1978 (RX 64). The trip sheet by Earl Richards shows that they were hauled from "Pittsfield, Ill." to "Rodhouse Bros" on November *18*, 1978 (CX 11, p. 10). Mrs. Manson's check stub shows that she paid Earl Richards on November 22, 1978, for hauling the 21 steers on November *18*, 1978, from "Pitts" to "P Hill" (CX 11, p. 11).

However, the 21 steers arrived a day or two earlier, on November 16 or 17, 1978. Respondent's Kansas City purchase invoice for the 21 steers is dated November 16, 1978 (RX 63), which is usually, but not always, the day they arrive in Pittsfield. Mrs. Manson's check stub shows that she paid Merle Springer Trucking on November 22, 1978, for hauling the 21 steers (which were included in a group of 58) on November 17, 1978, from "K.C." to "Pitts" (CX 11, p. 8).

Respondent's worksheet for Transaction 12 (which I have concluded was fabricated (see § XVIII, *infra*)), shows that three "horns," including "1 Crip," were replaced by three steers from respondent's inventory. But the worksheet shows no prorated shrink calculations. Respondent testified that since those 21 steers had been at Pittsfield for 2 or 3 days and regained their shrink, he just weighed the 18 sent to Rodhouse (without calculating shrink), and added three from inventory. Specifically, he testified (Tr. 335–36):

---

[135] Mr. Rodhouse's phrase "[t]o the best of my ability" is the identical phrase he had just used in stating that "[t]o the best of my ability, I remember being there" when the Transaction 11 steers were sorted (Tr. 49).

Q. Now, calling your attention to Exhibits Nos. 63 through 66, this is the deal of 21 head to Rodhouse, would you examine that?

A. Yes.

Q. Were those steers sorted in your lots?

A. It appears those cattle might have been around a couple or three days. Those cattle would have, we would have taken a reweight on those would be my observation from what I see here. I see they were bought on the 16th and this was not done until the 18th. I was just looking at the head count here and this would be about what they would try to get at one time and could not get them all so they have come back probably at a later date and wanted to get enough to finish them up. So these cattle probably were some we have had out of Kansas City and just fit them to them. But I would say from my observation here that these cattle would have been weighed.

Q. Those are cattle that have been around long enough to pick up their shrink?

A. Right.

Q. You just reweighed them back out from the time they purchased them?

A. Right.

Similarly, Mrs. Manson testified that 18 steers from the 21 head lot were merely reweighed without calculating shrink since they would have been in Pittsfield long enough to regain their shrink. She testified (Tr. 278):

Q. You mean they were weighed twice in Pittsfield?

A. I couldn't answer that. The cattle were bought on the 16th and these were sold on the 18th, so they were just reweighed. If there would have been any shrink to them, they would have gained their shrink back, so they were just reweighed when they were sold. Our cattle that we have out in our feed lots are just weighed and shipped out with what they weigh. There is no shrink or anything put on the cattle in the feed lot. So, these were just reweighed.

Hence Mr. Rodhouse's testimony that he remembered, to the best of his ability, that he was present when the 21 steers arrived is

contradicted by documentary evidence and the testimony of respondent and Mrs. Manson.[136]

Accordingly, I give no weight to Mr. Rodhouse's testimony as to Transaction 12. In this respect, I also rely on the ALJ, who saw and heard the witnesses testify (see § XII(H), *infra*). The ALJ states (Decision and Order on Remand at 18-19, 38):

> The customers testifying (for Respondent) had little or no actual recollection of the particular transaction(s) and operated from general impressions and practices. Even the few who thought they had some recollection of the transactions qualified and hedged to some extent and did not have any particular point to buttress or support their recollection of that day of routine business affairs. Basically, without any intent to impugn or demean them, they were used as spear carriers in the production. They were in and out quickly, with little effort to develop supporting details on points in their testimony, which was generalized in character and effect. They testified truthfully, based on their generalized impressions, but the value of that evidence concerning the limited issues here—these 14 transactions—is limited and doubtful.
>
> They relied on scale tickets, their own judgement and experience and general impressions. They also showed sympathy for Respondent—not an unusual observation in regulatory disciplinary matters—even including those who testified for Complainant. The probative value with respect to the particular transactions is almost nil. They generally purchased on a weight transfer basis from Saylor and did so on these transactions too. They had no reason to be suspicious or distrustful.
>
> * * * * * * *
>
> A customer [Mr. Rodhouse] who thought he recalled the particular transaction and witnessed the sorting, was unsupported by any buttressing circumstances or reasons given to recall it or distinguish it from other transactions on other days. But Saylor's office copies of the invoices and scale tickets on his transactions were dated *after* the cattle had been delivered and paid for, yet his copy of the invoice

[136] Actually the error was by respondent's trial attorney. Even though Mr. Rodhouse was respondent's witness, he was completely led by respondent's trial attorney as to this transaction, answering affirmatively to each of the key questions.

was timely dated and received by him (this should not be successfully passed off as a simple "misdating" error).

Thus, the testimony of the buyers was not given much probative weight because of their demeanor, their obvious desire to support Respondent and the generalized nature and subjectivity of their testimony. He was their neighbor, friend and business associate. They had little to lose and no particular complaints about him.

The ALJ's reference to dates on respondent's invoices and scale tickets being after the cattle had been delivered is, *inter alia*, to Transaction 11, as to which Mr. Rodhouse also testified that he remembered being at Pittsfield when his steers were being sorted. Mr. Rodhouse testified as to Transaction 11 (again answering affirmatively to respondent's trial attorney's leading questions) (Tr. 48-49):

Q. Calling your attention to certain cattle purchased by you from Mr. Saylor on November 7, 1978, being 79 head of steers, do you recall that transaction?

A. As to the best of my ability, yes.

Q. What kind of steers were those?

A. They were mixed cattle. I think those were of a heavyweight, maybe seven to eight hundred pounds, but just real specific, it's been sometime back.[137]

Q. Were you present when these steers were in Mr. Saylor's lot in Pittsfield, Illinois?

A. I was.

Q. Did you assist in sorting this load of steers or this lot of steers to fit your specifications?

A. To the best of my ability, I remember being there,

A. Yes, sir.

Q. Were you satisfied with that transaction?

A. Yes, sir.

Here, again, Mr. Rodhouse's testimony (as to two salient facts—three if we include the difference between 638 pounds and 700 to 800 pounds) is contradicted by documentary evidence. His trial attorney led him (i) to recall the transaction on November 7, 1978, and (ii) to recall receiving scale tickets for the cattle he received (see, also, Tr. 53-57). As shown in § XVII(C), *infra*, however, the documentary evidence shows that the transaction occurred on November 6, 1978, and I infer (see XVII(C), *infra*) that the scale tickets were not dummied up until the next day, November 7, 1978, which is the date they are dated, and the date that appears on respondent's carbon copy of the invoice to "Louis Rodhouse & Bros" (Rx 62). (The original invoice issued to "Rodhouse Bros" is dated November 6, 1978 (CX 12, p. 2)).

Accordingly, I believe, as the ALJ believed, that Mr. Rodhouse's memory was faulty as to these two routine transactions that occurred over 3 years before he testified.

As to the other 12 customers who testified, I categorically accept every word they said, 100%, without qualification! The problem is that they said nothing relating to whether respondent padded the weights on the 14 transactions alleged in ¶ II of the complaint. Hence their testimony is not helpful to respondent here.

Of course they had a high regard for respondent and were satisfied with his livestock transactions. That is consistent with the complaint. The complaint charges respondent with engaging in an unfair and *deceptive* practice (Complaint ¶ V; 7 U.S.C. § 213(a)). If the allegations of the complaint are true (as I have found them to be), respondent deceived his customers. Accordingly, I would expect them to be satisfied with respondent's transactions. Their satisfaction is a tribute to respondent's deceptiveness. (Even if respondent's customers had remained satisfied if they had known that respondent padded his purchase weights, that would not have affected the sanction in this case (see § XIX, *infra*)).

In addition, in some of the transactions, where respondent's worksheets show that his sorting destroyed the uniformity in the weights of the lots originally purchased for the customers, their satisfaction is an indication that respondent's claimed sorting did not occur. That is, respondent's customers wanted uniform quality and uniform weights (Tr. 41, 60, 63, 71, 110-18, 132, 347-50). If respondent had substituted the "heavyweights" ha said he substituted in Transactions 7, 11 and 13, the customers would not have been

satisfied. Similarly, the customer would not have been satisfied with the mixture of normally-priced steers and cheap steers respondent claims he delivered in Transaction 4 (see § I(E)(1), *supra*).

Many of respondent's customers knew that he sorted livestock at Pittsfield, approved of the practice, and observed or assisted in such sorting.[138] But only Mr. Rodhouse testified that he observed or assisted in the sorting in a transaction (*i.e.*, Transactions 11 and 12) alleged in the complaint. For the reasons set forth above, I do not accept his testimony. As for the other customers, the fact that they knew that respondent sorted livestock *in other transactions* helps complainant's case, *i.e.*, it shows that respondent had the *opportunity* for fraud in the particular transactions at issue here, without arousing suspicion (see § XII(C), *infra*).

It is interesting, but not significant, that only four of respondent's customers (only one of whom was involved in one of the 13 alleged reweighing transactions) testified that they weighed the livestock received from respondent, *i.e.*, Jennings (Transaction 8), Lowder (Transaction 14), Mansfield (not involved in complaint) and Andres (not involved in complaint) (Tr. 59–60, 73–74, 112, 120; CX 17).[139] Mr. Lowder (Transaction 14) testified that respondent's livestock shrank about 6%, which was "about right" (Tr. 62). However, we know that 2% of his shrink in Transaction 14 resulted from respondent's calculator (see § II, *supra*).

The record is silent as to whether the customers other than Rodhouse (Transactions 11 and 12), Long (Transactions 1 and 2), and Bauer (not involved in complaint) received scale tickets from respondent. They were the only three who testified that they did (Tr. 43–57, 67).

It is interesting, but not significant, that no customer testified that he knew or thought that respondent's printed scale ticket weights did not reflect the actual amount of livestock on the scale at Pittsfield. No witness was asked that question. Complainant's at-

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[138] The record is silent as to whether Graf (Transactions 3 and 4) or Gentry (Transaction 5) observed or even knew of respondent's sorting activities (Tr. 32–37; CX 15, 19). They were the two customers for whom respondent bought on commission. The record is also silent as to whether Jennings (Transaction 8), Jones (Transaction 13), or Lowder (Transaction 14) knew of respondent's sorting activities (Tr. 58–64, 85–91, 126–29; CX 17). Also, Bauer and Mansfield (not involved in the complaint) testified that respondent's loads to them were sorted only on occasions (see § XII(C), *infra*).

[139] It is not significant whether the livestock was weighed by the customers because there is not a farmer, dealer or government employee who has the ability to judge whether a load of livestock that showed, *e.g.*, 6% shrink, actually shrank 6% in transit, *e.g.*, from Kansas City, Missouri, to Pleasant Hill, Illinois, or whether it shrank 4% and respondent's pocket calculator caused the other 2% shrink.

torney was not in a position to ask the question since the customers testified before Mrs. Manson and respondent admitted (or claimed) that respondent engaged in such a practice. Respondent's trial attorney, who knew, or should have known, that respondent claimed that he printed phony scale tickets, *i.e.*, including "prorated shrink," did not ask any of the customers whether they knew of, or approved of, that practice.[140]

Respondent's present attorney argues (Respondent's Proposed Findings and Brief on Remand at 32-33):

> Saylor would weigh the cattle and figure how much the cattle had shrunk. Then he would prorate that shrink back to the scale weights of the cattle left in that load. Then he would add the replacement cattle. How else would Saylor do this?
>
> Saylor added the shrink back to get back to the purchase weight on the cattle left in the load. Saylor's customers knew of this practice. For example, see testimony at T. 45. Of the 13 customers who gave testimony, none complained about this practice. The USDA had every opportunity to question them about it, but could elicit no complaints.

As stated above, complainant's attorney had no opportunity to ask the customers about whether they knew that respondent printed phony scale tickets because it never occurred to him that respondent would admit (or claim) that he engaged in such an outrageous violation of law (see § VII(C)(3), *supra*).

The one record reference respondent's attorney gives, "T. 45," does not support his claim. (And I have found nothing else in the record to support his claim.) In the first place, the reference is to the testimony of respondent's witness, Fred Bauer, who is not involved in the complaint. Hence even if he knew of respondent's claimed practice, that would be of no help to respondent with respect to the transactions at issue in this proceeding.

Furthermore, I do not even read Mr. Bauer's testimony as indicating that he knew that respondent's scale tickets were phony. He testified (Tr. 45) (emphasis added):

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[140] Even if the customers knew of respondent's claimed practice of printing phony scale tickets that included prorated shrink, and approved of the practice, that would not reduce the sanction that would be imposed for such an outrageous violation of law. But in the 13 alleged reweighing transactions, I have found that respondent did not print scale tickets with prorated shrink. He printed scale tickets with no livestock on the scales to cover up his pencil additions to his purchase weights.

Q. How are these cattle brought to your feedlot?

A. They're most generally brought by, well, by truck.

Q. In transit, do they have to stop at Pittsfield?

A. They have on occasions.

Q. Have you ever been to Pittsfield when your cattle is down in Pittsfield?

A. Possibly maybe once or twice.

Q. Do you know, as a matter of fact, your cattle when they come to Pittsfield, might have some head removed and some have been replaced by different size cattle?

A. Yes, they have.

Q. Has that been with your consent?

A. That is right.

Q. *When that is done, how is the price determined on these replacement cattle?*

A. *Well, it's always usually prorated; or—in all cases, I've always had a scale ticket.*

Q. Have you been satisfied with Mr. Saylor's dealing as a livestock commission man?

A. I sure have.

It appears to me that Mr. Bauer never really gave the matter much thought as to how respondent handled the accounting. The question to which he was responding related to price—not weight—and it was limited to how the price was determined "on these replacement cattle." (Respondent does not claim to add any prorated shrink on the weight of the *replacement* cattle—he claims that he uses the actual Pittsfield weight of the livestock allegedly added from his inventory (see § VII(C)(2), *supra*)).

Mr. Bauer replied, "Well, it's always usually prorated. . . ." His use of "usually" immediately following "always" indicates a correction in thought in mid-stream. He then said "or—." The two dashes by the reporter presumably reflect a pause (otherwise the reporter would have used a comma). His conclusion, "or—in all cases, I've always had a scale ticket," suggests to me that he accepts a scale ticket at face value (as is customary in the livestock industry). If you have a serially numbered scale ticket with printed weights, there is no reason to give the matter any further thought. The fact

that Bauer "always had a scale ticket" was enough to give him confidence in the transactions.

In short, there is no support in the record for respondent's attorney's argument that respondent's customers knew that he printed phony scale tickets.

In conclusion, to respond to respondent's attorney's argument in his court brief, at 11, that "the ALJ [and presumably the JO] makes no attempt to explain why he rejected the testimony of the dozen customers," I reject the testimony of only one customer, Mr. Rodhouse, for the reasons stated above. I accept every word said by every other customer, but find in their testimony nothing helpful to respondent with respect to the particular transactions at issue here.

XII. Additional Circumstances Common to Most Transactions that Are Links in the Total Factual Situation Leading to the Inference that Respondent Fabricated All the Worksheets and Scale Tickets in Transactions 1-14 to Cover Up His Weight Padding.

A. The Increases in Respondent's Sale Weights Over His Purchase Weights for the Identical Number and Type of Animals Purchased a Day or Two Before All Fit Into a Neat Formula, Exactly 2% or Exactly 3% Over His Purchase Weights in 7 of the 14 Transactions, Which Is Highly Significant Under the Laws of Statistical Probability.

Complainant prepared a table showing that the increases in respondent's sale weights over his purchase weights for the identical number and type of animals purchased a day or two before fit into a neat and easily computed formula (*e.g.*, exactly 2% or 3% of respondent's purchase weight in 7 of the 14 transactions). The formula prepared by complainant to show how the weight was added in the 14 transactions involved here is set forth on the next page (except that the footnote is corrected to show that Transaction 12 is rounded to the nearest 10-pound increment, and Transactions 11 and 12 are reversed to correspond to the order listed in the complaint).

Transaction No.	Purchase Weight (lbs.)	Sale Weight (lbs.)	Added Weight (lbs.)	Formula for Added Weight *
1	46,285	46,515	230	.5% of purchase weight
2	42,150	42,995	845	2% of purchase weight
3	45,365	45,710	345	3 lbs. per head
4	45,350	46,710	1,360	3% of purchase weight

Transaction No.	Purchase Weight (lbs.)	Sale Weight (lbs.)	Added Weight (lbs.)	Formula for Added Weight *
5	26,730	27,265	535	2% of purchase weight
6	43,770	44,645	875	2% of purchase weight
7	46,150	47,535	1,385	3% of purchase weight
8	130,912	131,492	580	10 lbs. per head on 58 head purchased in K.C.
9	37,680	39,395	1,715	20 lbs. per head on average per-head weight
10	44,905	45,220	315	5 lbs. per head
11	47,670	50,435	2,765	35 lbs. per head
12	12,850	13,280	430	20 lbs. per head on average per-head weight
13	92,375	95,145	2,770	3% of purchase weight
14	54,030	55,110	1,080	2% of purchase weight

* All calculations are to the nearest 5-pound increment, except Transaction 12 is to the nearest 10-pound increment.

Respondent contends that there is a 35-pound error in complainant's formula for Transaction 9, which involves 84 steers sold by respondent to Jerry Langdon on October 13, 1978. Respondent's Kansas City purchase invoice for 84 steers purchased the day before, October 12, 1978, is reproduced on the following page (RX 48).

GEORGE W. SAYLOR, JR.
Volume 44 Number 6

Kansas City Invoice for Lot No. 69, October 12, 1978 (RX 48)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

528 LIVESTOCK EXCHANGE BUILDING — KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3205
SAM CAMPBELL 816-333-5378
J. HAROLD SCHMIDT 816-331-4518
ED GORMAN Bonner Springs, Kansas 913-721-2339
WILL N. CORSON 913-432-0846
OFFICE
GLORIA EVANS

Area Code 816
PHONE 842-3255

Bought for the Account of —
GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

Date 12 October 1978, 19
Shipped to Jerry Langdon, Jacksonville
Via Truck

NO. 69

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	5	[illegible]			2450	18.81	77.25	1,782.88	
[illegible]	8				3860	18.26	74.40	2,821.84	
[illegible]	19				8180	18.69	77.00	6,355.86	
[illegible]	36				16,585	18.45	74.60	12,372.41	
[illegible]	7				2935	18.65	75.00	2,201.25	
[illegible]	9				3620	18.57	77.75	2,815.45	
									28,149.67
	84				37,680				
			296						

Respondent's Exhibit #48

Average Weight 449 287
Average Cost 75.51

VACC., DEHORNING, BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	37.85
COMMISSION	
TOTAL	28,187.52
CASH	

Draft Check:

Respondent's sale weight in Transaction 9 for 84 steers invoiced at 39,395 pounds (RX 51) is 1,715 pounds more than his purchase weight the day before for 84 steers weighing 37,680 pounds (JO Ref. 296, p. 381) (39,395 −37,680 = 1,715).

Respondent multiplies 84 ×20 pounds, which equals 1,680 pounds, *i.e.*, 35 pounds lighter than respondent's increase (1,715 −1,680 = 35). Accordingly, respondent contends that complainant's formula is off by 35 pounds in Transaction 9 (Respondent's Reply to Complainant's Opening Brief on Remand at 12).

However, respondent has misread complainant's formula. The 20 pounds per head in Transaction 9 was added to the "average per-head weight"—not to the number of head. The average per-head weight of respondent's purchase was 449 pounds (JO Ref. 297, p. 381) (37,680 ÷84 = 448.57, which rounds to 449). Adding 20 pounds to 449 pounds average weight equals 469 pounds, and multiplying 469 pounds by 84 equals 39,396 pounds, which rounds to 39,395 pounds. That is the exact invoice weight to the buyer (RX 51). Hence complainant's table for Transaction 9 is not in error.[141]

Complainant's table, standing alone, affords a sufficient basis for one who is familiar with the laws of statistical probability to draw an inference that respondent added weight by pencil in the 14 transactions involved here. For example, looking just at the seven increases of exactly 2% or exactly 3%, their individual probabilities are computed in § I(D)(4) as follows:

Individual Probabilities of Increases of Exactly 2% or Exactly 3%

Transaction Number	Individual Probability	Sale Date
2	1 in 339	Sept. 15, 1978
4	1 in 545	Oct. 6, 1978
5	1 in 215	Sept. 1, 1978
6	1 in 351	Sept. 14, 1978
7	1 in 555	Sept. 29, 1978
13	1 in 1,109	Nov. 28, 1978
14	1 in 433	Dec. 2, 1978

[141] The 35-pound difference results from rounding. If respondent had increased the actual average weight, 448.57 pounds, by 20 pounds, and multiplied 468.57 ×84, his sale weight would have been 39,359.88 pounds, which rounds to 39,360 pounds. That would have been an increase of 1,680 pounds over the purchase weight (39,360 −37,680 = 1,680), the amount arrived at by respondent's attorney.

Respondent admittedly only engaged in "approximately 300 transactions" during the relevant time period with all customers (Appeal from Judge's Decision filed October 6, 1982, at 2). Hence, under the laws of statistical probability, Transaction 2, at odds of 1 in 339, more than used up all of respondent's expected likelihood of having an increase of exactly 2% or exactly 3% during the relevant time period.

The concept of statistical probability is expressed in Freund, *Modern Elementary Statistics* 99 (3d ed. 1967) (Lib. of Cong. Catalog Card No. 66-29560, as follows):

> As a result of this discussion, we can now interpret the probability of an event as *the proportion of the time it will occur in the long run.* If we say that an event has a probability of 0.30, we mean that if the experiment is repeated a great many times the event will occur about 30 per cent of the time. The more often the experiment is repeated, the "more certain" we can be that the proportion of "successes"—that is, the proportion of the time the event will occur—will be very close to 0.30. Note that we do not claim that the event *must* occur 3 times out of 10, 30 times out of 100, or 300 times out of 1,000; we can only claim that *if the experiment is repeated a sufficient number of times* the proportion of "successes" will practically always (say, 99.99 per cent of the time) be very close to 0.30.

Here, we have a sufficient number of total transactions, approximately 300, that the odds against respondent having seven "successes," *i.e.*, increases of exactly 2% or exactly 3%, when, at most, only one "success" would be expected, would be so enormous as to make respondent's claim that they all occurred by chance unbelievable. (As shown in § IV(A), *supra*, the odds of increases of exactly 2% in Transactions 2 and 6 are 1 in 41,152.)

I have avoided any reference in this decision as to how I would handle the other increases in the formula to avoid giving unnecessary advice to other potential weight padders. The other increases would be more difficult, but not impossible, to handle under the laws of statistical probability.

It is not unusual for a person engaged in weight fraud to vary the amount of weight added or subtracted considerably, so as to make detection more difficult.[142] What is surprising here is not

[142] See, *e.g.*, *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1211 (1979) (remand order), *final decision*, 40 Agric. Dec. 736 (1981); *In re Muehlenthaler*, 37 Agric. Dec. 313, 327-30, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36

Continued

that there is some variance in the formula, but, rather, that the is such a great degree of consistency—exactly 2% or 3% above th purchase weight in seven transactions. Here, again, I would find just as easy to believe in the Tooth Fairy as to believe that the vai ious circumstances respondent contends produced those results ac tually caused them, rather than his pocket calculator adding 2% o 3% to the purchase weights.

Although the pattern revealed in complainant's table set forth above deserves weight in this case, in view of the great mass of other evidence proving that respondent padded his purchase weights and fabricated worksheets and scale tickets to cover up his fraud, I will merely give it substantial weight (not enough to change the result in any transaction even if disregarded entirely).

B. In Addition to Buying Livestock for His Inventory, Respondent Buys Particular Loads of Livestock to Fill Particular Orders of Customers, Giving Him the Opportunity to Pad Weights.

Although respondent and his bookkeeper, Mrs. Manson, were both evasive, their testimony establishes quite clearly that respondent not only buys livestock to place in his inventory for later use, but he also buys many loads of livestock to meet specific orders of customers.

Mrs. Manson admitted that she takes orders from customers by telephone, and if respondent is not in, she relays the orders to him by mobile phone, radio and telephone. She testified (Tr. 131-32):

Q. And how many days a week is George usually at his place of business?

A. Probably two full days.

Q. What is he doing the rest of the time?

A. He is either at sales, Kansas City, Springfield, out looking at cattle.

Q. Do you keep track of him while he is gone?

A. I try to.

Q. What is the method of which you do that?

A. He has a radio in his car and a mobile phone in his car, and if he gets out of range where I can't reach him

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Agric. Dec. 1114, 1130 (1977), *aff'd per curiam* (unpublished), 575 F.2d 879 (5th Cir. 1978).

either way, he stops and calls in. I have a radio in my car and we just keep in touch with each other.

Q. If he is out buying and orders come in, what do you do?

A. I will, until I can contact him, take the information from the farmer and approximately how many head they want. George knows the farmer and he knows the quality of this and that, and comments the farmers make.

* * * * * * *

Q. Now, generally speaking, would you briefly go through the procedure used when you get an order for cattle?

A. When George gets an order for cattle, all of them are sorted.

Q. I mean, you get the order that comes into the place and they want to buy 100 head of cattle, what would you do then, tell George?

A. Oh, yes.

Q. And when he buys the cattle what happens then?

A. Well, they come in to Pittsfield——

Q. (Interrupting) I am talking about feeder cattle only, I am not talking about fat cattle.

A. George tries to fill the order and they are shipped into Pittsfield and they are sorted and they are put into uniform shape the way each farmer wants them. They are all, when they come into Pittsfield to start with, they are weighed off the truck for transit to see how much they have shrunk.

When Mrs. Manson was asked on cross-examination whether respondent would have bought the 128 head of cattle in Transaction 13 without an order, she was quite evasive, but finally admitted that she was sure he had an order. She testified (Tr. 192–93):

Q. Do you know whether or not Mr. Saylor would have purchased 128 head of cattle if he didn't have a customer for them?

A. If he didn't have a customer for them?

Q. Yes.

A. You are talking about cattle. He might have a dozen customer. I don't understand what you mean?

Q. Does he buy cattle in the hopes that he will get an order at some later date for those cattle?

A. He probably has an order for it but to classify if he would buy 128 head, you are going to have to explain to me if you mean all certain size, all certain quality——

Q. That is not my question. Do you know whether or not Mr. Saylor had an order from Mr. Jones when he bought these cattle?

A. I am sure he did.

Similarly, although Mrs. Manson was at first evasive and misleading about the numbers used by respondent at livestock markets when he buys livestock to fill particular orders, she finally admitted on cross-examination that the numbers shown on invoices to respondent reflect the person for whom the livestock was purchased. To understand her testimony, we need to examine respondent's Kansas City purchase invoice in Transaction 9 relating to respondent's purchase of 84 steers for Mr. Langdon,[143] reproduced on the next page (CX 9, p. 5), and respondent's carbon copy of his invoice to Mr. Langdon, reproduced on the following page (CX 9, p. 1).

[143] In this subsection, we are not concerned with whether the 84 steers were actually *sent* to Mr. Langdon, but only with whether they were *bought* to fill his order. My reasons for inferring that these 84 steers were actually sent to Mr. Langdon, with 20 pounds per head added by pencil, are discussed in § XV, *infra*.

Kansas City Invoice for Lot No. 69, October 12, 1978 (CX 9, p. 5)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC.

528 LIVESTOCK EXCHANGE BUILDING — KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3205
SAM CAMPBELL 816-333-5376
J. HAROLD SCHMIDT 816-331-4815
ED GORMAN Bonner Springs, Kansas 913-721-2955
WILL N. CORSON 913-432-0844 OFFICE
GLORIA EVANS

Area Code 816
PHONE 842-3255

Bought for the Account of —
GEORGE SAYLOR LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILLINOIS

298 — 299 — NO. 69

Date 12 October 1978, 19
Shipped to Jerry Langdon, Jacksonville
Via Truck

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	5	[illegible]			2450	18.51	71.25	1,75288	
[illegible]	8				3665	11.26	74.00	2,71164	
[illegible]	17				5118C	11.69	[illegible]	6,35586	
[illegible]	36				16,585	11.45	74.00	12,27290	
[illegible]	7				2635	11.65	75.00	2,21625	
[illegible]	7				3620	11.57	77.75	2,85746	
	54				37685				28,24466
300			301						

Average Weight 449
Average Cost 75.51

VACC., DEHORNING, BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	2268
COMMISSION	
TOTAL	302 → 28,46235
CASH	

Check

Transaction 9 Invoice Copied From Respondent's Records (CX 9, p. 1)

GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363
PHONE (217) 285-6186
(217) 285-4011

DATE Oct 13 1978

SOLD TO [illegible] Springfield
[illegible] Jacksonville

NO.	KIND	WEIGHT	PRICE	AMOUNT
54	[illegible] (K.C.)	39345	72.29	28523 33
	468.69			43 30
303				
	[illegible] 4.09 #			$28912 63
	[illegible] Price			
	Date Cut at K.C.			
	P/O # 5033			
	[illegible] K.C.			

304
28,450.35

#2877

Signed _____

WE APPRECIATE YOUR PATRONAGE

Respondent's Kansas City purchase invoice shows that on October 12, 1978, respondent purchased 84 steers (JO Ref. 300, p. 389) weighing 37,680 pounds (JO Ref. 301, p. 389) at a price of $28,450.35 (JO Ref. 302, p. 389). Respondent bought these steers at Kansas City under "NO. 69" (JO Ref. 229, p. 389). They were to be "Shipped to Jerry Langdon, Jacksonville" (JO Ref. 298, p. 389).

Respondent's carbon copy of his invoice to the buyer in this transaction shows that on October 13, 1978, respondent sold 84 steers to Jerry Langdon invoiced at 39,395 pounds, an increase of 1,715 pounds (39,395 −37,680 = 1,715).

When Mrs. Manson was questioned on cross-examination as to the meaning of Nos. 68 and 69 (JO Ref. 303, p. 390), which appear on respondent's carbon copy but not on the buyer's original copy (CX 9, p. 2), she denied that the numbers indicate the lots from which respondent claims the 84 head came. She testified (Tr. 236):

> Q. [CX] No. 9, [p. 1] that is Kansas City.
>
> No. 68 and No. 69, does that mean that that is the lots from which those eighty-four head came?
>
> A. No. That would mean that those cattle were gate-cut out of Kansas City by Buyer No. 68 and No. 69.
>
> Q. Buyer number, I see.
>
> Does that mean that there would be more than one person buying in Kansas City?
>
> A. No.
>
> Q. The same person would have several numbers?
>
> A. Yes.
>
> Q. Who was the person?
>
> A. It would be Mr. Saylor.

Mrs. Manson's first answer that Nos. 68 and 69 mean that the cattle were gate-cut out of Kansas City "by Buyer No. 68 and No. 69" would imply that two persons were present. When pressed further, however, she conceded that only one person, Mr. Saylor, was involved in the purchase.

Her answer that Nos. 68 and 69 do not mean that that is the lots from which respondent claims the 84 head came is absurd.[144] In

[144] Respondent's cover sheet to his exhibits for Transaction 9 states "at Pittsfield Sort out 84 head from Load # 68 and 69 weight 39395." Similarly, respondent's

Continued

addition, Mrs. Manson later admitted, in connection with her cr examination as to Transaction 3, that respondent buys under ferent buying numbers which designate the customer to whom thinks the livestock is going. Respondent's Kansas City purch invoice for the purchase of 98 heifers for Graf Cattle Compnny Transaction 3 is reproduced on the next page (CX 3, p. 4).

---

worksheet shows that the 84 head sent to the customer in Transaction 9 came from "68-69," and shows the combined purchase weight of Lot Nos. 68 and 69, *i.e.*, 81,950 pounds (RX 50) (44,270 (RX 46) + 37,680 (RX 69) = 81,950).

As shown in § XII(D), *infra*, the fact that the 84 steers purchased under "No. 69" were purchased for (and actually sent to) Mr. Langdon is revealed by the fact that the exact cost of those cattle, $28,450.35 (JO Ref. 302, p. 389) is shown at the bottom of respondent's carbon copy of the invoice to the buyer (JO Ref. 304, p. 390). The handwritten figure on respondent's carbon copy of the invoice to Mr. Langdon was not written by the Judicial Officer but, rather, appears on CX 9, p. 1. It was written by Mr. Gentry because the handwritten figure of 28,450.35 (which is legible on RX 51) is legible on complainant's film but not on the xerox reproduction (Tr. 13). (Footnote 146 follows.)

Kansas City Invoice for Lot No. 61X, September 28, 1978 (CX 3, p. 4)

KANSAS CITY LIVESTOCK ORDER BUYING CO., INC

528 LIVESTOCK EXCHANGE BUILDING KANSAS CITY, MISSOURI 64102

LEE THROCKMORTON 816-333-3206
SAM CAMPBELL 816-333-5378
J HAROLD SCHMIDT 816-331-4818
ED GORMAN Bonner Springs, Kansas 913-721-2966
WILL N. CORSON 913-432-6646
OFFICE
GLORIA EVANS

Area Code 816
PHONE 842-3255

Bought for the Account of — 305 Date 28 September 1978, 19

GEORGE SAYLOR LIVESTOCK
BOX 287
PITTSFIELD, ILLINOIS

Shipped to GRAF CATTLE CO.
DIXON, ILL

no. 61X HFRS

PURCHASED FROM	CATTLE	CALVES	HOGS	SHEEP	WEIGHT		PRICE	AMOUNT	TOTAL
[illegible]	30	44			11665	1695	6260	7453 53	
[illegible]	12				5255	1766	6210	3264 22	
[illegible]	17				5135	1769	6080	3120 08	
[illegible]	8				2355	1760	6060	1427 33	
	6				2325	1772	6100	1418 48	
	7				2370	1766	6050	1433 85	
[illegible]	5				1725	1771	6125	1056 81	
[illegible]	13				4665	1794	6050	2823 33	
	92				35985	17	59	6110	22 [illegible] 67
MBJ	6				2110	1759	6110	1289 05	
	98	✓			38095				23645 45

Average Weight 387
Average Cost 62.09

VACC., DEHORNING, BRANDING	
INSURANCE	
TRUCKAGE	
LOADING CHARGE (RAIL)	
THRU FREIGHT	
FEED	38 10
COMMISSION	
TOTAL	23683 55
CASH	

Draft Check:

When questioned about this invoice, Mrs. Manson admitted th the number under which the livestock was bought, No. 61X (J Ref. 306, p. 393), indicates to respondent the customer to whom h thinks the livestock will be shipped. (In fact, in this case, not onl the number but, also, the name of the customer for whom the liv stock was to be shipped was written on the Kansas City invoice (J Ref. 305, p. 393)).[146] Specifically, Mrs. Manson testified on cross-e amination (Tr. 238-39):

> Q. Mrs. Manson, would you look at Complainant's Exhibit 3, Page 4, please?
>
> Got it?
>
> A. Yes.
>
> Q. At the top of the page there it says, in typewritten letters, "Shipped to Graf Cattle Co., Dixon, Illinois". Do you agree?
>
> A. Yes.
>
> Q. Now, I understand that this invoice was prepared in Kansas City. How would the people who prepared it in Kansas City know that these cattle were to be shipped to Graf Cattle Company?
>
> A. By Mr. Saylor.
>
> Q. Whenever Mr. Saylor told Kansas City where to ship the livestock, we could expect that the invoice would have that destination shown as it is here, is that correct?
>
> A. The invoice?
>
> Q. This invoice (indicating).
>
> When Mr. Saylor told the K. C. people where they should go, they would type it in or write it in?
>
> A. Mr. Saylor, when he buys cattle in Kansas City, they are bought under different buying numbers.
>
> Q. Yes.

---

[146] The "Shipped to"information was put on the Kansas City invoices by the Kansas City Order Buying Company staff to show the truckers where to haul the loads (§§ I(C)(1)(a), III(C), *supra*). Where it was left blank, respondent's loads would, of course, be hauled to Pittsfield.

A. When he buys them under different buying numbers, he thinks, "Well, this is where these cattle are going to go," so when he gets back to the office, he don't wonder who he bought these cattle for, and he usually has them put a name to who he thinks that they are going to go to on it.

Notwithstanding the admission of his bookkeeper (just quoted) that the numbers on the invoices reflect the customer to whom respondent thought that he would ship them,[147] respondent was not willing to admit that much. He admitted only that the numbers enable him to keep track of the cattle as he is building a load. (A load could, of course, be built for a particular customer's order.) Respondent testified (Tr. 309-10):

Q. What arrangements do you have in Kansas City?

A. At the time referred to here, we were clearing through Kansas City Livestock, and their people would take care of the cattle. Now, I clear my own cattle and I have a driver of my own that takes care of them.

Q. You will notice different numbers on these. Those are lot numbers or pen numbers, aren't they?

A. Excuse me, sir?

Q. They are lot or pen numbers on these; they are all in the '60's, right?

A. You are referring to——

Q. (Interrupting) Number 68 on this?

A. Oh, that is—I guess you could classify it however you want to. It is a buyer's—it is just something for me to keep track of my cattle on, I mean, till I get up towards a load built up.

Q. In other words, what you do when you start to buy is you will assign them a certain number to where you get approximately a load?

A. As near as I can to what number will, I mean, you know, I try to keep as close as I can. There is one kind of cattle on a number. Now, we will run into difficulties in,

[147] As shown in the discussion of the individual transactions, I infer that respondent not only thought he was going to send certain loads to certain customers—he knew he was going to do so, at an increase in weight.

maybe, getting our load put out and I might slap ten or fifteen steers on a number knowing that they are not going to stay there when I leave out there. But it takes a lot of the work out of it when I get home, and it also helps keep my loads, you know, I can kind of tell when I've got so much weight. Just glancing, this load of cattle here could not have come across Missouri on one truck. I don't know how they got here, I mean, how many cattle we have to take off, but evidently we would have had to have taken off about 1,200 or 1,500 pounds.

Q. Mr. Saylor, how many numbers do you maintain there at Kansas City, buyer numbers.

A. As far as the yard company is concerned, I kind of have been, not really assigned, but took the numbers in the 60 series, from 60 through 69.

Q. And if you need extras you had an X or something like that?

A. I had an x, yes, sir, or something like that. The people, if they see a number in the 60 series, and there is problems, they kind of know, generally, who to start talking to, you know, if we have a problem.

From respondent's testimony (and from general trade custom of which I am quite familiar), it is clear that although respondent uses the same numbers repeatedly, those numbers do not refer to the same customer. For example, No. 69 might be used for Mr. Graf one week and for Mr. Langdon the following week.

Although as shown above, respondent's bookkeeper flatly admitted that respondent buys livestock to fill orders, respondent's admission to this effect was less forthright, but enough to constitute an admission. He testified (Tr. 299-300, 343):

Q. Now, do you purchase on order from various people who need cattle?

A. They will call us and tell us what they need, most of them, you know, we are familiar with what they are talking about, and then we go from there.

Q. And you cattle that way; do you buy cattle that you do not have orders for?

A. Lots of them.

Q. What is done with those cattle that you buy that you do not have orders for?

A. Generally we will bring them in and shape them up, get them in pens according to their quality and their weights and like that, and then put them out in some of our outside feed yards. And, you know, in a week or two they will fit somebody.

* * * * * * *

Q. Now, are all the transactions that are listed in the complaint commission transactions?

A. I do not believe I understand your question, sir.

Q. Did you buy all of the cattle that are listed in the complaint on order?

A. I don't know as I exactly bought any of them at all on order.

Q. That is, did you have an order from the customer to buy a given number of cattle?

A. I possibly did on part of them. Part of that is anticipation, and every few days somebody will need such and such kind of cattle.

The admitted fact that respondent bought some livestock on order for particular customers is one of the circumstances upon which I rely, in connection with the totality of the facts in this case, to infer that respondent bought the particular livestock involved here to fill customer's orders, and shipped the livestock to the customers without sorting (irrespective of whether the animals went through Pittsfield enroute to the customers). This circumstance is, of course, innocuous when considered alone, but it shows that respondent had the opportunity to pad weights illegally.

C. Respondent (i) Frequently Sorts Livestock at Pittsfield Purchased for a Particular Customer, and (ii) Frequently Purchases Livestock for a Particular Customer Without Sorting. This Presented the Opportunity for Fraud, Without Arousing Suspicion.

As shown in § XI, *supra*, it is undisputed that respondent brings many loads of livestock to Pittsfield, where he sorts out undesirable animals and substitutes animals from his inventory. Numerous farmers testified that they saw respondent do that. The farmers

are satisfied with those transactions, and USDA is satisfied w those transactions.

However, numerous other purchases are made by respondent i customers which do not involve sorting. Respondent called Fr Bauer as a witness, who operates a feedlot in Carrollton, Illinois, which he maintains about 1,500 head monthly year-round (Tr. 4 44). He had bought from 3,000 head to 5,000 head of cattle from i spondent from 1977 to 1981 (Tr. 44). He testified that the livesto stopped at Pittsfield only "on occasions." Specifically, he testifi (Tr. 44-45):

> Q. Have you actually gone to Kansas City and been there when George Saylor has been in Kansas?
>
> A. I have.
>
> Q. Has George Saylor bought cattle for you at Kansas City?
>
> A. He has.
>
> Q. What is the method that you use when George buys cattle for you, how are they paid for?
>
> A. Well, George just mails me a bill and scale tickets on his return back to Pittsfield.
>
> Q. How are these cattle brought to your feedlot?
>
> A. They're most generally brought by, well, by truck.
>
> Q. In transit, do they have to stop in Pittsfield?
>
> A. They have on occasions.

Similarly, Darrell Mansfield, a cattle feeder from Whitehall, Illinois, testified on behalf of respondent that only half of the livestock bought by respondent for him stop at Pittsfield, and that only "[o]n occasion" is there a substitution. Mr. Mansfield testified (Tr. 73):

> Q. What is his [respondent's] practice when he buys cattle in Kansas City, that is, what happens?
>
> A. They're charged, if I happen to be there myself, it will be charged to a number—I will assume a number, and it will be charged to that account. When the sale is over, I walk out, go home, and he mails me a bill and I send him a check.

Q. Do those cattle in transit stop in Pittsfield, Illinois, usually?

A. Half and half.

Q. Are your cattle the identical ones that you get at home are the ones that were purchased in Kansas City, or are there cattle substituted on occasions?

A. On occasion, there'll be a substitution.

In addition, Earl Richards, one of the truckers who hauled livestock for respondent, testified that in "certain cases," he "hauled cattle for Mr. Saylor that they are unloaded and sorted and then reloaded" (Tr. 96), but that in "[s]ome cases" he "hauled livestock into Mr. Saylor's yards in Pittsfield and unloaded them and then reloaded the same cattle without resorting them" (Tr. 97).

Finally, respondent referred in his testimony to transactions where "we are bringing livestock straight through, in other words, we don't go to the trouble of going through the feed yards" (Tr. 302).

The fact that many farmers saw respondent sort their livestock in Pittsfield in transactions not involved in the complaint, and animals were substituted with their consent and approval, is not "alibi" evidence, or a circumstance against complainant's case here.[148] In fact, it is an important part of complainant's proof. That is, since complainant is relying largely on circumstantial evidence in some of the transactions, it is necessary for complainant to prove that respondent had the opportunity to commit the offense alleged. The fact that respondent frequently sorts livestock in Pittsfield, with the knowledge and approval of customers, is the very fact that afforded respondent the opportunity for padding weight in those transactions where respondent did not sort the animals in Pittsfield (irrespective of whether the truck stopped at Pittsfield enroute to the customer).

D. Respondent's Bookkeeper Wrote the Cost of the Particular Lots Purchased for Customers on the Bottom of Respondent's Carbon Copy of the Invoices to Customers. This Entry Was of No Value to Respondent, under Respondent's Contention. I Infer It Was Done to Show Respondent's Exact Gross Profit on the Transactions.

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[148] A defendant charged with robbing a bank on January 15, 1985, could not defend by having witnesses testify that they saw him in the bank on numerous other occasions, and he did not rob the bank on any of those other occasions.

In 12 of the transactions (all except Transactions 10 and 11), respondent's carbon copy of his invoice to the customer shows a figure written in pencil on the bottom left-hand corner which is exactly the same as the gross price respondent had just paid for the identical number of livestock, usually the day before (see, *e.g.*, § I(C)(3)(b), *supra*).[149]

Respondent's bookkeeper testified on direct examination that the figure at the bottom of respondent's carbon copy of the invoice to the customer is her estimate of the raw cost of the cattle in the load. I accept that testimony 100%. However, she also testified that the reason she wanted to keep track of how much each particular load cost was so that, at the end of the month, she would have a rough idea of the amount of money respondent had in his cattle *in inventory*. I reject that explanation as utter nonsense! Specifically, Mrs. Manson testified (Tr. 136–37) (emphasis added):

> Q. Now, do you put other figures on the face of your copy of the statement?
>
> A. Yes, I do.
>
> Q. What is the purpose of those figures?
>
> A. *The purpose of those figures, come the end of the month what cattle we have on inventory, we have a rough idea of the amount of money we have in those.*
>
> Q. I understand that is for your own inventory purposes?
>
> A. Right.
>
> Q. Is that figure on the statement delivered to the customer?
>
> A. The bottom figure, the one I put on there?
>
> Q. Yes.
>
> A. No.
>
> Q. That is your own figure?
>
> A. *My estimate of what is in those cattle.*

[149] In Transaction 14, I cannot determine the exact animals purchased totalling respondent's "cost" figure because the 124 steers from which respondent sorted 70 steers were purchased in 40 lots, but in the other 11 transactions, it is very easy to see where the "cost" figure came from. In Transactions 10 and 11, although the "cost" figure is not shown on respondent's copy of the invoices to the customers, in each of those transactions respondent had just bought in one lot the exact number of animals sold to the customers.

Similarly, with respect to the individual transactions with respect to which she was questioned on direct examination, she made it clear that she wrote the figure at the bottom of her invoices to show her estimate of the raw cost of the cattle in the particular load. She also stuck to her story that the reason for keeping the cost estimate of the particular load was so that she would know the amount of money respondent had in his cattle *in inventory* at the end of the month. Her testimony as to each transaction is as follows (emphasis added):

Transaction 1 (Tr. 143) [150]

Q. All right. Now, then, the figure down at the bottom showed 29,264.20. What is that figure?

A. *That is, again, my personal figure, to try to keep track of how much that particular load cost, so* come the end of the month, *I would know the amount of money we had in the cattle in inventory.*

Q. So, in other words, the difference between the $29,876.58 and the $29,264.20 would include the trucking and the commission?

A. Right. The figure at the bottom is just *raw cost* and no expense.

Transaction 2 (Tr. 147) [151]

The figure at the bottom is *my estimate, raw cost of the cattle.*

Transaction 3 (Tr. 149) [152]

Q. What is the figure down at the bottom, 28,060.42?

---

[150] Respondent purchased 77 steers on August 10, 1978, costing $29,264.20 (RX 1). He sold 77 steers at an increase in weight in Transaction 1 the next day for $29,876.58, excluding insurance, or $29,921.39, including insurance (RX 4). The figure at the bottom of his carbon copy of the invoice to the customer is "29,264.20" (RX 4).

[151] Respondent purchased 67 steers on September 13, 1978, costing $27,206.21 (RX 5). He sold 67 steers at an increase in weight in Transaction 2 two days later for $28,398.20, excluding insurance, or $28,440.80, including insurance (RX 8). The figure at the bottom of his carbon copy of the invoice to the customer is "27,206.21" (RX 8).

[152] On September 28, 1978, respondent purchased 98 heifers costing $23,652.62 (RX 16) and 17 heifers costing $4,407.23 (CX 3, p. 10), for a total of 115 heifers costing $28,059.85. He sold 115 heifers at an increase in weight in Transaction 3 the next day for $29,066.99, excluding insurance, or $29,110.59, including insurance (RX

Continued

A. That is *my estimate of the cost of the cattle*, with no expenses added.

Transaction 6 (Tr. 157) [153]

Q. Now, you will notice the figure down there on the bottom, "35,215.74" ["30,215.74"], would you tell us what that is?

A. That is *my estimate, raw cost of the cattle for inventory sake.*

Transaction 7 (Tr. 160) [154]

Q. What is Exhibit No. 40?

A. This is a sales invoice to Bill Meyers for sixty-nine steers, weighing 47,535.

Q. What is the number down there on the bottom, "29,196.85"?

A. *My estimate of the raw cost of the cattle. That is for inventory.*

Transaction 8 (Tr. 163) [155]

Q. Now, then, that figure down at the bottom there (indicating), "80,498.58", what does that figure amount to?

A. *My estimated raw cost of the cattle for inventory purposes.*

---

22). The figure at the bottom of his carbon copy of the invoice to the customer is "28,060.42" (RX 22). (Mrs. Manson had a 57¢ error here ($28,060.42 −$28,059.85 = $.57)).

[153] Respondent purchased 87 steers on September 13, 1978, costing $30,215.74 (RX). He sold 87 steers at an increase in weight in Transaction 6 the next day for 31,912.25, excluding insurance, or $31,960.12, including insurance (RX 36). The gure at the bottom of his carbon copy of the invoice to the customer is "30,215.74" (RX 36).

[154] Respondent purchased 69 steers on September 28, 1978, costing $29,196.85 (RX 37). He sold 69 steers at an increase in weight in Transaction 7 the next day for $30,408.14, excluding insurance, or $30,453.75, including insurance (RX 40). The figure at the bottom of his carbon copy of the invoice to the customer is "29,196.85" (RX 40).

[155] Respondent purchased 58 steers on October 12, 1978, costing $24,652.65 (RX 41) and he purchased 131 steers costing $55,845.93 (RX 42), for a total of 189 steers costing $80,498.58. He sold 189 steers at an increase in weight the next day for $84,583.82, excluding insurance, or $84,710.96, including insurance (RX 44). The figure at the bottom of his carbon copy of the invoice to the customer is "80,498.58" (RX 44).

Transaction 14 (Tr. 175) [156]

Q. And down at the bottom I note there is a figure on that, "$53,103.23".

A. *My estimated cost of the cattle for inventory purposes.*

In considering whether Mrs. Manson's explanation makes any sense as to why she wrote the cost figures on the bottom of her carbon copies of the invoices to the customers, we must remember that she already had a record of those cost figures in her records, *i.e.*, the purchase invoices that respondent received when he bought the livestock showed the purchase price, head count, weight and date. Hence, if she just wanted to compare the head count and weight purchased each month with the head count and weight sold each month, there was no need to write the cost figure for a particular load on her carbon copy of the sales invoice to the customer.

Moreover, when we look at the actual figures involved in each transaction, according to respondent's (fictional) story as to the number of head taken from and sent to inventory, we can see that putting the cost figures on the invoices could not in any way have facilitated the determination, at the end of the month, of the amount of money respondent had in his cattle *in inventory*. The following table is based on respondent's (fictional) account as to what happened in each of the 14 transactions involved here. (The source of the data is given in the discussion of the individual transactions, and the source documents can easily be found by looking at complainant's and respondent's exhibits for each transaction.)

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[156] On December 1, 1978, respondent purchased 89 heifers costing $21,716.58 a 32 heifers costing $10,506.55 (CX 14, p. 19), for a total of 121 heifers costin $32,223.13. He also purchased 124 steers costing $41,993.75 (CX 14, p. 19; $74,216.88 −$32,223.13 = $41,993.75). He sold 121 heifers at an increase weight in Transaction 14 the next day for $33,104.58, excluding insurance, and 70 steers for $21,547.68, excluding insurance, for a total of 191 head for $54,652.26, excluding insurance, or $54,761.56, including insurance (RX 80). The figure at the bottom of his carbon copy of the invoice to the customer is "53,103.23" (RX 80). Subtracting the cost of the 121 heifers from the figure at the bottom leaves $20,880.10 for the cost of the 70 steers ($53,103.23 −$32,223.13 = $20,880.10), but since respondent purchased 124 steers in 40 separate lots, I cannot identify which steers were used (at least without a great deal of effort). (We know that the raw cost figure relates only to the 70 steers and 121 heifers sent to the customer since the cost to respondent of the 121 heifers and 124 steers was $74,216.88 (CX 14, p. 19), whereas the cost figure written at the bottom of respondent's carbon copy of the invoice to the customer is only "53,103.23.")

Transaction Number	Raw Cost Figure (From Purchase Invoice) Shown at Bottom of Respondent's Carbon Copy of Invoice to Customer	Number of Animals Represented by Raw Cost Figure	Number of Animals Represented by Raw Cost Figure Allegedly Sent to Customer	Number of Animals Represented by Raw Cost Figure Allegedly Sent to Respondent's Inventory	Number of Animals From Respondent's Inventory Allegedly Sent to Customer
1	29,264.20	77	75	2	2
2	27,206.21	67	54	13	13
3	28,060.42	115	108	7	7
4	28,207.71	55	0	55	0
5 *	16,155.92	43	?	?	0
6	30,215.74	87	75	12	12
7	29,196.85	69	63	6	6
8	80,498.58	189	189	0	0
9 **	28,450.35	84	?	?	0
10 ***	—	—	—	—	—
11 ***	—	—	—	—	—
12	8,458.03	21	18	3	3
13	60,742.59	128	117	11	11
14 ****	53,103.23	191	191	0	0

* Respondent claims that two lots were accidentally mixed, and 43 steers sorted from the mixture were sent to the customer.

** Respondent claims that two lots were accidentally mixed, and 84 steers sorted from the mixture were sent to the customer.

*** No raw cost figure is shown on respondent's carbon copy of the invoices in Transactions 10 and 11, which were rewritten by Mrs. Manson (see § XVII).

**** The exact steers included in the cost figure cannot be determined, but the cost figure relates only to the 191 head sent to the customer rather than to the 245 head purchased (see note 156, *supra*.)

As we can see in the table above, the 189 head and 191 head in Transactions 8 and 14, respectively, had no impact whatever on respondent's inventory. No livestock was taken from or added to inventory in these transactions.[157] In Transaction 1, 77 head were purchased, and only 2 head were allegedly taken from and sent to inventory. Hence, the impact on respondent's inventory was *de minimis*. In contrast, in Transaction 4, all 55 head represented by the raw cost figure were allegedly sent to inventory, and the 55 head sent to the customer were allegedly taken from two other lots purchased at the same time—not from inventory. In each of the

[157] As shown in note 156, *supra*, in Transaction 14 respondent bought additional steers at the same time that presumably went to his inventory, but they are not included in the raw cost figure written on respondent's carbon copy of the Transaction 14 invoice.

other transactions, the impact on respondent's inventory was negligible.

Accordingly, I reject as utter nonsense Mrs. Manson's claim that she "tied together" on one sheet of paper (her copy of the invoice to the customer) the cost data and sales price data for each transaction so that she would know at the end of the month the amount of money in respondent's cattle *in inventory*.

On the other hand, if, as complainant contends (and the ALJ and I have found), respondent did not sort or substitute animals in the 13 alleged reweighing transactions involved here (all except Transaction 8), but merely increased his purchase weights by an arbitrary number of pounds (*e.g.*, 2% or 3% of the purchase weight), the pencil figure at the bottom of respondent's copy of the invoice to the customer enabled respondent's bookkeeper to immediately determine the gross profit on the transaction.

On cross-examination as to the figures at the bottom of her invoices, Mrs. Manson was unable to give any rational explanation in support of her alleged reason for writing the purchase cost figure on the bottom of her copy of the invoice to the customer. She finally concluded that the figure at the bottom of her invoices "actually means nothing" (Tr. 221), but then immediately recovered, and repeated her original story that it "is for my purposes, so I have an idea to tell Mr. Saylor what is in inventory come the end of the month" (Tr. 221). As shown above, it is useless for that purpose.

Mrs. Manson admitted that she no longer puts the figure at the bottom of her invoices, and now uses an "easier" system "kept in the books" (Tr. 219) to give her "an idea of what is in the cattle" (Tr. 221). Under her new system, she no longer has to wait "un the end of the month and do the whole month's deal," as she allegedly had to do under the old system, to derive any meaning from the figures (Tr. 221).

Based on all the evidence as to this matter, I infer that Mrs. Manson's original system was not the inefficient, practically useless system she described. I infer that it was designed and used to determine exactly and immediately respondent's gross profit on the transactions.

Mrs. Manson's testimony on cross-examination as to this matter, set forth below, is worth reading in its entirety to demonstrate that she was completely unable to give a logical explanation for the cost figures kept on the bottom of her invoices. Her testimony on cross-examination is as follows (Tr. 210-21) (emphasis added; transcript pages shown in brackets):

[210] Q. I understand your testimony about the pencil notation at the bottom of many of these invoices, bottom left, to represent what I have written down here, *average cost of cattle for inventory purposes*. Did I write that down right?

A. Yes.

Q. Mrs. Manson, would you look at Complainant's Exhibit 1, please, Page 1, and tell me what was the average cost of the cattle that went into inventory as a result of this transaction [Transaction 1]? [158]

A. That went into inventory?

Q. Yes.

A. I couldn't tell you off this.

Q. What is the average cost of cattle that came out of inventory, looking at this document?

A. The figure on the bottom with raw cost.

Q. All of these cattle came out of inventory?

A. No. What do you mean, they all came out of inventory?

[211] Q. All 77 head came out of inventory?

A. No.

Q. What portion of them came out of inventory?

A. I would have to go back to my work sheet to tell you.

Q. My question is just looking at the document, Page 1, what does that figure at the bottom tell you about the value of cattle in your inventory as a result of this transaction?

A. It doesn't tell me anything on just this one figure. I would have to wait until the end of the month and figure up my estimated raw cost of the cattle and the gross sales, or the amount of cattle sold, and that would give me an average cost of the cattle that we would have on inventory.

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[158] As shown in the table above, the "raw cost" figure represents the purchase price of 77 head, only 2 of which allegedly went to inventory, and only 2 head from respondent's inventory were allegedly used in the transaction.

Q. Let me understand this, at the end of the month you go through all of your invoices and add up these numbers in the left-hand corner to get your cost of goods sold, raw cost?

A. Yes.

Q. How do you get—where do you get your gross income for the month, those figures?

A. The gross income?

Q. Yes.

A. Is off the invoices.

[212] Q. So when you making up the trial balance for the month of August in 1978, you wrote down $29,264.80 [$29,264.20] for the cost of the cattle purchased and in the tabulation for gross income you wrote down $29,921.39? [159]

A. I would use the purchase price of the cattle, comparing it to the gross sales and I would use the head count bought and the head count sold and the head count that is in inventory would be into the weight, and into the money, which would give me an average of the weight of the cattle on inventory and the average cost of the cattle that is on inventory.

Q. This figure on the bottom left, $29,264.80, that also appears on Page 6, doesn't it [*i.e.*, on respondent's Kansas City purchase invoice]?

A. Yes.

Q. An alternative method of determining the cost of the cattle Mr. Saylor purchased would be to tabulate all of the purchase invoices, would it not?

A. Would you repeat that?

Q. An alternative method to the one used by you, to determine the cost of the cattle Mr. Saylor purchased during the month, would be to tabulate all of the purchase invoice prices as manifested by, for example, Complainant's Exhibit 1, Page 6?

A. I don't follow what you mean.

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[159] See note 150, *supra*.

[213] Q. You have explained to us how *you determined the cost of the cattle purchased, using the numbers you would enter on the bottom of these invoices,* and you have explained to us how you determined the gross income for the month, that is you take the sales price to Mr. Saylor's customers as indicated on these invoices and just add all of those up, right?

A. Yes.

Q. I am suggesting to you that an alternative method to determining the cost of the cattle that Mr. Saylor purchased, would be to tabulate the purchase invoices like Page 6?

A. That is what I would do at the end of the month.

Q. You mean you do not use the figures in the bottom left-hand corner of the invoices issued to Mr. Saylor's customers?

A. *This figure that is on the bottom of this invoice is my estimated raw cost of what is in these cattle.* At the end of the month your purchase and your sales.

[214] A. Your purchase and sales are figured up, along with your head count, to get your head count that you have got on inventory and the money that you have got, an average of the money that you have got in inventory.

On this particular load right here, there was two heads sorted off. I classified them as Kansas City cattle and I used the Kansas City money on this particular load *to have a rough idea of the cost that was in the cattle.*

If you will look *on my worksheet,* you will see, *or George's worksheet,*[160] that there was two taken off.

Q. Yes, I understand that.

Now, let us concentrate on what you do at the end of the month, here, to determine the amount of money Mr. Saylor makes during the month and how much money he has tied up in inventory.

You told us that you used these figures, here, on the bottom left-hand corner of these invoices, to determine the

[160] Interesting slip of the tongue!

st of the cattle Mr. Saylor has purchased during the nth?

A. The raw cost.

Q. Right.

This is a hypothetical now. I understand that you uld also arrive at precisely the same figure by using the rchase invoices, themselves, Kansas City purchase [215] voices, Palmyra, Farmers & Traders, and so forth, is at not correct?

A. I do not understand the question.

Q. Mrs. Manson, will you agree with me that the figure, t the bottom left-hand corner of Complainant's Exhibit 1, Page 1 [respondent's carbon copy of his invoice to the customer for 77 steers], is precisely the same as the figure at the bottom of Complainant's Exhibit 1, Page 6 [respondent's Kansas City purchase invoice for 77 steers]?

A. Yes. I have already told you that.

Q. All right. Complainant's Exhibit 2, will you agree ith me that the figure at the bottom of Page 1 [respondent's carbon copy of his invoice to the customer for 67 eers], $27,206.21, is precisely the same as the figure on omplainant's Exhibit 2, Page 5, at the top, $27,206.21 [respondent's purchase invoice from Ed Van Ee for 67 steers]?

A. Yes.

Q. On Complainant's Exhibit 4, Page 1 [respondent's arbon copy of his invoice to the customer for 55 steers], at he bottom left-hand corner of the page is $28,207.71. Will ou agree that that is precisely the same as the figure at he bottom of Complainant's Exhibit 4, Page 4, $28,207.71 respondent's Kansas City purchase invoice for 55 steers]?

A. Well, that is not my writing to the side. My writing I annot read and I do not have the full——

Q. But what appears on the exhibit, those figures are identical, is that right?

A. I cannot say that because on Page 4 it is only $28,207.7.

Q. At the top, the last figure I can read is a "six". Agreed?

[216] A. Yes.

Q. At the bottom, the last two digits I can read is "thirty-five"?

A. Yes.

Q. Six and five are eleven, right?

A. Yes.

Q. Carry the one. Three and three are six, plus the one is seven?

A. Yes, but I have got "seventy-seven" on the bottom of this. If there is a "one" on there, it is not on this copy.

Q. Would you look at Complainant's Exhibit 5, Page 1 [respondent's carbon copy of his invoice to the customer for 43 steers]?

Will you agree with me that at the bottom to the left, of the document, there is written outside the heavy black line, "$16,155.92"?

A. Yes, it is, but it is not my writing.

Q. I understand that.

And on Page 6 of Complainant's Exhibit 5 [respondent's Kansas City purchase invoice for 43 steers] is "$16,155.92", at the bottom of the page?

A. Exhibit 5, Page 6?

Q. That is right.

A. "$16,155.92".

Q. O. K. Now, the second of each of the documents that we have been looking at are purchase invoices manifest-[217] ing the purchase, by Mr. Saylor, of cattle, correct?

A. Yes.

Q. Now, since those two figures are the same, if you add all of the figures that came from the left-hand corner of Page 1 of these exhibits, you will arrive at the same total as the figures obtained from adding the totals from the

A. In these instances, yes.

Q. Very well. Now, we went through and looked at several of the worksheets and we discovered that the worksheet showed varying amounts coming from inventory and varying amounts going to inventory, is that not correct?

A. Yes.

Q. Now, given that fact, I want to ask you what is the value of the figure in the bottom left-hand corner, in determining the value of the inventory?

What does it tell you?

A. What does it tell me?

Q. Yes.

A. Come the end of the month, I would tell you.

Q. What?

A. The average cost that we would have in those cattle, the head count and average weight, raw with no expense.

Q. But how can you know how many cattle are in in-
[218] ventory?

A. Well, if you bought them and you did not sell them, you have got them in inventory.

Q. How can you tell from this Page 1 that you did not sell them? Strike that.

Let us go back and look at Complainant's Exhibit No. 1, again.

Now, Page 1 has your figure down at the bottom of the page, $29,264.20. Now, would you look at Page 3? [161]

A. Yes.

Q. There is no such figure. Why not?

A. Those, probably, were taken out of inventory. I would not know.

Q. I am sorry. I did not hear your answer.

---

[161] Complainant's Exhibit 1, p. 3, is a copy of respondent's invoice to the same customer as in CX 1, p. 1, for 48 steers sold on August 8, 1978, which are not involved in this case (Tr. 10).

A. I said that those cattle, probably, were taken out of inventory. I would not know.

Q. If there is no figure at the bottom left-hand corner of the page, does that mean that all the cattle appearing thereon came out of inventory?

A. They could have. It is not impossible.

It is hard to tell. This is why I try to keep a rough idea of the cattle, so I would know at the end of the month on these cattle.

Q. You have given one possible explanation for the meaning of the absence of a number at the bottom of the [219] page but said, "It was probably". Are there other possible explanations for the meaning of the absence of that number?

A. Well, it all would depend on my day.

Mr. SCHIMMEL: I am going to object to this line of questioning any further because Exhibit 1 is her copy and the evidence shows, by your own evidence, that Exhibit 3 was the one that was given to the purchaser, the third page, that is, and she already has testified that she kept it on her copy only.

Mr. HEINZ: That would be another explanation to my question, would it not? Yes.

By Mr. HEINZ:

Q. Do you currently enter the figures at the bottom left-hand corner on your sales invoices, as you did in the fall of 1978?

A. No, I do not.

Q. Why not?

A. Because it is kept in the books. I found out it was more easier that way.

Q. When did you change that practice?

A. This year.

Q. About what time during the year?

A. At the beginning of the year.

Q. Is it possible, Mrs. Manson, that the figure in the bottom left-hand corner represents the cost of the [220] cattle sold on that page?

A. *It is an estimated raw cost, what I think is in them, even though the cattle are sorted, one head or whatever amount of head is put on there.*

Q. If you have got a lot of cattle and you know precisely what fifty-two, out of fifty-five head, cost but you do not know how much the only [other] two head cost, then your estimate would be pretty accurate, would it not?

A. If I knew all but what two head were?

Q. Yes.

A. Oh, it depends on how long those two head had been there, what the price of the cattle was, how long we fed them. It would not be all that accurate.

Q. My question was as to how accurate the estimate would be, if you knew fifty-three, out of fifty-five head? You would know precisely what the cost of fifty-three head would be and, therefore, your estimate would be very close to precise, is that not correct?

A. I would have to say no. At the particular time when I draw this sheet up, I might find out different from the end of the month.

Q. All right. Let us contrast a case where you know precisely what twenty head, out of the fifty-five head, cost but you do not know how much thirty-five head cost, then the figure at the bottom left-hand corner would be [221] a grossly inaccurate estimate of the cost of the cattle in that sale, is that not correct?

A. *This here is just my estimated cost, for me to have some idea of what is left in inventory, come the end of the month.*

This here actually means nothing. It is for my purposes, so I have an idea to tell Mr. Saylor what is in inventory come the end of the month.

Judge WEBER: *The question was: Is it grossly inaccurate?*

By Mr. HEINZ:

Q. *Can you answer that?*

A. *I could not right—I would have to wait until the end of the month and do the whole month's deal. This is why I have went to a book type, so I have got it all right there and I can take the expense out of it, and I can have an idea of what is in the cattle.*

Q. *Would you agree with me that, given the fact of the precision with which you know the actual cost of the cattle involved in any one sale varies considerably, it necessarily follows that the precision of your estimate, as to the raw costs, is going to vary considerably?*

A. *I would say yes.*

The ALJ, who saw and heard the witnesses testify, concluded that Mrs. Manson was not a credible witness because of her demeanor, as well as the substance of her testimony. His decision is, however, silent as to this particular matter. Based on the ALJ's determination as to her demeanor, as well as the substance of her testimony in this respect, I do not believe Mrs. Manson's explanation as to the cost figures shown on the bottom left-hand corner of respondent's copies of the invoices. I infer that she wrote the figures at the bottom of her copy of the invoices so that she could contemporaneously give respondent the exact gross profit from each transaction. (The absurd claim she made in her testimony as to the reason for wanting to keep track of the raw cost data for each load strengthens the basis for this inference.)

E. The Number of Animals Allegedly Added from Respondent's Inventory Exactly Equaled the Number Allegedly Sorted Out, Even Though Some Customers Bought in Approximate Amounts.

There is no apparent reason why, if respondent had actually removed some animals and substituted others in order to create a uniform load, the number of animals added exactly equaled the number of animals sorted out.[162] Feedlot operators and farmer feeders frequently order approximate amounts since they know

[162] The number of animals allegedly taken from and sent to inventory is shown in the table in § XII(D), immediately above. In Transaction 4, which shows 0 animals taken from inventory and 55 sent to inventory, this is not contrary to the point made in the present subsection. Exactly 55 steers were purchased, and exactly 55 steers were sent to the customer, but the 55 steers sent to the customer allegedly came from two other lots purchased on the same day on which the 55 steers were purchased.

that it is difficult to purchase the exact number required (see Tr. 115, 128). Animals are frequently sold in bunches, from a few head up to about 70 head (see, *e.g.*, Tr. 351; RX 74A-74AAAA). When Mrs. Manson was describing how she takes orders, she testified that I "take the information from the farmer and approximately how many head they want" (Tr. 131). (Some farmers, of course, order a specific number (Tr. 360)).

The ALJ states (Decision and Order on Remand at 21):

> But Saylor created, admittedly, false scale tickets to match his invoiced weights to his customers. The scale tickets, presumably, were perceived to add some veneer of credibility to an observer without an auditor's grasp or advantages.
>
> Similar rationale may underlie Saylor's practice in these transactions of reselling the identical number of cattle that he had purchased. It seems strange that "sorting" never resulted in an increase or decrease of the number sold from the number purchased.[11]
>
> [11] Feedlots did not order X number of cattle and refuse delivery of X+2 or X−2.

Although we do not have all of the transactions from respondent's records during the relevant time period, and, therefore, we do not know whether all of respondent's alleged resorting transactions involve the addition of the exact number of animals allegedly removed, it is odd that in the number of transactions involved here, the alleged substituted animals exactly equaled the alleged number of removed animals. This is another circumstance in the total picture leading me to infer that respondent's worksheets and scale tickets were fabricated to cover up respondent's weight padding.

F. The Worksheets Were Allegedly Prepared by Respondent at the Time of Each Transaction, and Contemporaneously Recorded the Activities as They Occurred. Respondent Then Allegedly Gave the Worksheets to His Bookkeeper for Preparing the Invoices to the Customers.

Respondent testified that the worksheets, which are a scrap of paper, or a "buyer's card," are kept in his pocket, and he contemporaneously records the events and then gives the worksheet to his bookkeeper for preparing the invoices. He testified (Tr. 313-14):

Q. Now, these things like you've got here, which is Exhibit 3, is that your work sheet that you carry in your pocket?

A. Yes, that's just probably one kind of them.

Q. What is the purpose of that?

A. Well, really, it's a buyer's card that we keep track of what we do. I generally just pull it out and start, as soon as I do anything, making myself notes on them and what-have-you.

Q. What do you do with the notes after you made the notes on these sheets; do they go to Mrs. Manson for billing?

A. That's where they are supposed to go. Once in awhile I get a complaint, but I generally get them there sometime.

Mrs. Manson, respondent's bookkeeper, confirmed respondent's testimony, stating, "I do my work off information given to me" (Tr. 258).

Since the worksheet is allegedly prepared at the time the various sorting and weighing events are occurring, and the invoices are prepared from the worksheets, we become quite suspicious of the worksheets when they fail to exactly account for the information on the invoices, or when there is a fatal variance between the worksheet and the scale ticket, which cannot be satisfactorily explained.

The facts in this subsection do not constitute a separate circumstance relied upon in reaching the inference that respondent fabricated the worksheets and scale tickets, but it is important to understand how the worksheets are allegedly prepared and used when the individual transactions are analyzed.

G. The Cumulative Effect of Suspicious and Unexplainable Circumstances.

As shown in §§ I-VI, *supra*, and XIII-XVIII, *infra*, considering each transaction in isolation, there are strong circumstances leading to the inference that respondent merely added weight by pencil and fabricated scale tickets (in all but Transaction 8, where there was no alleged reweighing) and worksheets (in all but Transaction 14, where there was no worksheet) to cover up his weight padding. However, as stated at the outset in *In re Mattes Livestock Auction Market, Inc.*, 42 Agric. Dec. 81, 97, *aff'd*, 721 F.2d 1125 (7th Cir.

(1953), in a case where the proof is by circumstantial evidence, we do not look "on any single factor considered in isolation, but, rather, on the totality of all of the relevant facts and circumstances, considered as a whole." Hence in this case, we look at the many suspicious and unexplainable circumstances in one transaction in the light of the many suspicious and unexplainable circumstances in the other 13 transactions.

H. The ALJ, Who Saw and Heard the Witnesses Testify, Did Not Believe the Testimony of Respondent or Mrs. Manson, in Part, Because of Their Demeanor at the Hearing.

As shown in § IX(B), *supra*, the ALJ, who saw and heard the witnesses testify, did not believe the testimony of respondent or his bookkeeper, Mrs. Manson. He discussed in detail the "serious credibility problems arising from both demeanor and substance of the testimony of Respondent's bookkeeper as well as Respondent Saylor himself" (Decision and Order on Remand at 28).

In *Great Western Food Distributors* v. *Bronnan*, 201 F.2d 476, 479–80 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953), on appeal from a decision by USDA's Judicial Officer, this court stated:

> Often the "most telling part" of the evidence is not apparent from the printed page, "for on the issue of veracity the bearing and delivery of a witness will usually be the dominating factors". N.L.R.B. *v.* Universal Camera Corp., 2 Cir., 190 F.2d 429, 430. Thus, "we may not disregard the superior advantages of the examiner who heard and saw the witnesses for determining their credibility, and so for ascertaining the truth." Ohio Associated Tel. Co. *v.* N.L.R.B., 6 Cir., 192 F.2d 664, 668.
>
> . . . In short, anyone who has observed witnesses on the stand will know that those "who see and hear witnesses are much better equipped to weigh the evidence and determine the credibility to be extended to those testifying than are the judges of courts of review who do not enjoy the same advantages." Jennings *v.* Murphy, 7 Cir., 194 F.2d 35, 36.
>
> It would seem, then, that the function of this court is something other than that of mechanically reweighing the evidence to ascertain in which direction it preponderates; it is rather to review the record with the purpose of determining whether the finder of the fact was justified, i.e.

> acted reasonably, in concluding that the evidence, including the demeanor of the witnesses, the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings. To go further is to disregard the "most telling part" of the evidence. N.L.R.B. *v.* Universal Camera Corp., supra. With this in mind we approach the proof offered in this proceeding.

Similarly, in *Cella* v. *United States*, 208 F.2d 783, 788 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), a case involving false weights under the Packers and Stockyards Act, this court stated:

> The hearing officer observed these witnesses upon the stand. He was the trier of the facts. The matter of their credibility was for him to decide. Great Western Food Distributors *v.* Brannan, 7 Cir., 201 F.2d 476, 479.

Finally, in *Fairbank* v. *Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert denied*, 400 U.S. 943 (1970), also involving false weights under the Packers and Stockyards Act, the court stated:

> When the trier of the facts, as here, expresses a doubt on the validity of oral testimony, the reviewing authority should not substitute its own judgment for that of the Examiner unless his findings are hopelessly incredible or flatly contradict either a "law of nature" or undisputed documentary evidence. National Labor Relations Board *v.* Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); see also United States *v.* Oregon Medical Society, 343 U.S. 326, 339, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

For the foregoing reasons, I give considerable weight to tl ALJ's findings based on his determination that respondent ar Mrs. Manson were not credible witnesses.[163]

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[163] However, the documentary evidence in this case is so strong against respond hat I would have reversed the ALJ if he had found for respondent.

XIII. In Transaction 7, 13 Circumstances Lead Me to Infer that the 69 Steers Sold to Bill Meyer, Hull, Illinois, on September 29, 1978, Were the Same 69 Steers Purchased by Respondent in Kansas City the Day Before, to Which He Added Exactly 3% by Pencil to the Purchase Weight, and that Respondent's Worksheet (Attributing the Weight Increase to the Substitution of Six Steers at Pittsfield) and Scale Ticket Were Fabricated to Cover Up His Fraud. Respondent Made a Net Profit of $888.24, Which Is $772.86 More than the Profit a Legitimate Order Buyer Would Have Made, and Respondent Could Have Undercut a Legitimate Order Buyer by 25¢ Per Cwt.

Since the sanction would have been the same in this case even if respondent had committed the weight-padding and record-fabrication violations in only 1 of the 14 transactions involved here (see § XIX, *infra*), no useful purpose would be served by setting forth the evidence in the remaining transactions as extensively as has been done in §§ I–VI, *supra*. Accordingly, the remaining transactions are summarized briefly, to the extent practicable.

On September 28, 1978, respondent bought 69 steers as Kansas City Lot No. 62 weighing 46,150 pounds for $63.27 per cwt [164] (RX 37). The next day, September 29, 1978, respondent sold 69 steers to Bill Meyer, Hull, Illinois, for $63.97 per cwt at an invoice weight of 47,535 pounds (RX 40), which is an increase of 1,385 pounds, or exactly 3% over respondent's purchase weight (.03 ×46,150 = 1,384.5, which rounds to 1,385; 1,385 + 46,150 = 47,535).

I infer that respondent increased the purchase weight 1,385 pounds by pencil, and fabricated the scale ticket (RX 38) and worksheet (RX 39A, 39B) (which attributes the increase to the removal of six head at Pittsfield and the substitution of six others from respondent's inventory) [165] to cover up his fraud, because of the san 12 circumstances (except number 2) referred to in § IV(D), *supr* relating to Transaction 6.

In addition to the 11 circumstances referred to above, the six steers allegedly added by respondent from his inventory to replace six steers allegedly removed were so heavy in relation to the 63 head allegedly used from Kansas City that they would have destroyed the desired uniformity. The alleged Pittsfield weight of the 69 steers purchased in Kansas City on September 28, 1978, was 44,395 pounds (RX 39A), or an average of 643 pounds (44,395 ÷69 = 643). The alleged Pittsfield weight of the six steers added from inventory was 4,780 pounds (RX 39A), or an average of 797 pounds

[164] $29,196.85 ÷461.50 = $63.27.

(4,780 ÷6 = 797). That is 154 pounds heavier than the alleged Pittsfield weight of the 69 steers (797 −643 = 154). (And since both figures are average figures, some individual animals would necessarily be more than 154 pounds heavier.)

Making a comparison more favorable to respondent, the alleged Pittsfield weight of the six head removed was 3,245 pounds (1,635 + 1,610 = 3,245 (RX 39A)). Subtracting the alleged Pittsfield weight of the six head removed from the alleged Pittsfield weight of the 69 head leaves 41,150 pounds as the alleged Pittsfield weight of the 63 head remaining (44,395 −3,245 = 41,150), or an average of 653 pounds per head (41,150 ÷63 = 653). The six steers allegedly added were 144 pounds per head heavier than the alleged Pittsfield weight of the other 63 steers (797 −653 = 144).

The steers allegedly added would have been beyond the outer limits of the desired uniformity. Mr. Meyer testified that there would be "not very much" difference in the weight range on a uniform load (Tr. 41). He assumed there could be "100 pounds difference" between 700- and 800-pound steers (Tr. 42). (The 63 head allegedly remaining averaged only 653 pounds, so a difference of even 100 pounds would be excessive for them.)

Respondent also testified that Mr. Meyer likes cattle "[p]retty much" of "uniform weight" so that they will "finish up at the same weight" (Tr. 346). Respondent, therefore, tries to keep the weight range to "50 or 75 pounds at the most" (Tr. 347). Specifically, respondent testified (Tr. 346-47, 349-50):

> Q. Does Mr. Meyer want cattle of uniform weight?
>
> A. Pretty much so. He likes for them to finish up at the same weight. They might not have to be so uniform in weight, it would be according to the bone structure and what have you on any given steer. He kind of likes to go with cattle pretty much of the same kind, whether they be 1,000 or 1,200, he kind of likes to pretty much clean the lot or at least have a load at a time.
>
> Q. In your estimation, when somebody says they want cattle of a uniform weight, what is the maximum permissible weight range within that lot?
>
> A. I try to make a pattern, just like I got through telling you, the bone structure and the make-up of the animal in the flesh to try to keep cattle that will come out about the same time finished, have a choice quality, which will generally run, oh, 50 or 75 pounds at the most.

I don't like the 100-pound deals, that is my own thoughts that I do not like it.

Q. That means that when you put them into the lot they can vary as much as 50 or 75 pounds?

A. They can at the outside. Again, it depends on the nd [bone] structure of the animal, the frame he has got.

* * * * * * *

Q. If the cattle are the same, that is, that they have the me weight and they are the same type of cattle and they e the same quality of cattle, they have entered in the me condition and you fee [feed] them the same ration for e same period of time, is it reasonable to expect that ey will gain equal amounts of weight?

A. Usually, yes, sir.

Q. So it would be reasonable to expect that if we had a t of cattle and they were all the same, the same quality, at when we put them in the lot at around 700 pounds nd we market them at 1,100 pounds, we would have a eight difference of no more than, say, 50 to 75 pounds hen we marketed them, is that right?

A. I suppose. You would have a number of things enter nto that, however.

Q. I understand that. Now, my questions here have been directed to what has, my question talk about finished, that is, when the farmer talks about the cattle finishing up at the same time, he wants them all to be ready to market at the same time, right?

A. That is what he is referring to, yes.

Q. To your knowledge, does Mr. Meyer like his cattle to finish out at the same time on a given lot?

A. He likes to be able to load what would be able to be termed as a full load at one time, yes, sir.

Q. Now, when you are talking about cattle that were uniform when you put them in the lot to feed them out and finish them, if you have cattle that on the average weigh 670 pounds, if there were a few head in there that weighed 800 pounds, are the 800-pound cattle going to be uniform?

> A. They wouldn't be what I would call uniform. Again, the bone structure as to how, it might take those 800-pound cattle bone-structurewise as long to get fat as it would a 650-pound steer because the 650-pound steer might weigh 1,000 and the 800 pound-steer might weigh 1,200 too.

Although the lack of uniformity that would have been created if respondent had added the "heavyweights" he claims he added is not of decisive weight, it is one of the circumstances to be considered in this transaction.

One additional circumstance lends support to my inference that the weight gain of exactly 3% (at odds of 1 in 555 (see § I(D)(4), *supra*) resulted from respondent's calculator, rather than from substituting six steers, as alleged. The Kansas City purchase invoice issued to respondent shows that the 69 steers were "Shipped to B Meyer" "Via 4 hd E Richard, 65 M&I" (RX 37). In other words, two trucking companies were used.

Mr. Meyer states in his affidavit that he thinks the 65 steers came in mid-morning and the 4 came in the afternoon. Specifically, he states (CX 16, p. 5):

> On or about September 29, 1978, Saylor purchased 69 steers for me which was delivered on two trucks. One load was a full possum belley load of 65 steers and the other few came on a bob truck, I do not remember the name of the trucker.
>
> On or about 13, 1978, Saylor purchased 50 steers for me. . . .
>
> * * * * * * *
>
> I think the two loads each time arrived at my place in about mid morning and the truck with the few steers on arrived in the afternoon.

Although it is theoretically possible that both trucks could have passed through Pittsfield so that the 69 steers could have been weighed at Pittsfield, as shown on respondent's worksheet, the Kansas City invoice showing that two trucking companies hauled 5 head and 4 head "to B Meyer," which is consistent with Mr. Meyer's affidavit, leads me to infer, along with all the other evidence as to this transaction, that the trucks did not pass through Pittsfield.

This is not one of the transactions where complainant concedes, the payment date on the check indicates, that the trucks passed through Pittsfield enroute to the customer. Respondent's invoice to

Meyer is dated September 29, 1978 (RX 40). Mr. Meyer's check to respondent is dated October 2, 1978 (CX 7, p. 3).[166]

Respondent cheated Meyer out of $885.98 by the 1,385-pound pencil-weight addition (13.85 ×$63.97 = $885.98). However, this was one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $115.38 on this transaction ($.25 ×461.50 = $115.38). Respondent's net profit was $888.24 (Expenses: $29,196.85, purchase price (RX 37); $323.05, computed transportation;[167] $45.61, insurance (RX 40); Total expenses, $29,565.51; Respondent received $30,453.75 (RX 40); Net profit: $30,453.75 −$29,565.51 = $888.24). Subtracting respondent's weight-padding profit of $885.98 from his total profit of $888.24 would have resulted in a profit of only $2.26 without weight padding.

A legitimate dealer or order buyer making 25¢ per cwt commission or profit would have had to charge Meyer $64.22 per cwt on this transaction ($63.27 (purchase price) + $.70 (transportation; $323.05 ÷461.50 = $.70) + $.25 (commission) = $64.22). Respondent charged Meyer only $63.97 per cwt, or 25¢ less per cwt than a legitimate dealer or order buyer would have charged at 25¢ per cwt commission, and respondent still made $772.86 more than a legitimate dealer or order buyer would have made ($888.24 −$115.38 = $772.86).

Although Mr. Meyer was satisfied with respondent's transactions (CX 16; Tr. 37–42), and had been present on some occasions when respondent sorted livestock (Tr. 41), there is nothing in the record to indicate that Meyer saw the livestock involved here sorted (CX 16; Tr. 37–42).[168] Also, there is nothing in the record to indicate

[166] With some reluctance, I will mention in this footnote that the trip sheet for the 65 steers hauled by M&I, one of the two trucking companies involved, shows "Origin Kansas City, Mo" and "Destination Hull, Ill," without mentioning Pittsfield (CX 7, p. 8). I do not regard that as dispositive as to this transaction. I give it the weight of the dust that would fall from a feather in a gentle breeze.

[167] Respondent paid M&I Truck Line, Inc., 70¢ per cwt for hauling 65 of the steers weighing 43,550 pounds, or $304.85 (CX 7, pp. 8, 9). Earl Richards hauled the other four steers weighing 2,600 pounds (46,150 −43,550 = 2,600) at a cost not shown in the record. At the same rate of 70¢ per cwt paid M&I, the cost would have been $18.20 (26.00 ×$.70 = $18.20), for a total transportation cost of $323.05 ($304.85 + $18.20 = $323.05). However, unless Earl Richards was also hauling other livestock at the same time, his rate would have been higher. The transportation cost is of no real importance here since respondent did not make a dealer profit (without weight padding) in this transaction.

[168] Respondent's attorney's statement of facts, that "Mr. Meyer testified that he knew Saylor sorted *the* cattle and had been present at Saylor's facilities when sort-

Continued

that Mr. Meyer ever weighed livestock received from respondent, or that Meyer even had a livestock scale. Furthermore, Meyer thought that he was buying livestock at respondent's weights and prices, plus freight and commission (which he assumed was in line with the going rate). He stated (CX 16, p. 5):

> I have been led to believe, although I don't remember Saylor saying so specifically, that Saylor would buy the steers for me at a price and weight range discussed prior to his purchase and I would pay Saylor for the same weight for which Saylor paid and would pay the same price for which Saylor paid plus the freight from his source to my lots plus his commission which amount was not discussed but I assume was in line with the going rate.

In other words, Meyer had no way of knowing that, through weight padding, respondent made a profit of $888.24 in this transaction when the "going rate" would have been $115.38.

XIV. In Transaction 3, 10 Circumstances Lead Me to Infer that the 115 Heifers Sold to Graf Cattle Company, Dixon, Illinois, on September 29, 1978, Were the Same 115 Heifers Purchased by Respondent the Day Before, to Which Respondent Added Exactly 3 Pounds Per Head, and that Respondent's Worksheet (Attributing the Increase to the Substitution of Seven Heifers at Pittsfield) and Scale Ticket Were Fabricated to Cover Up His Fraud. Respondent Cheated Graf Out of $219.39 by the Weight Padding.

On September 28, 1978, respondent bought 98 heifers as Kansas City Lot No. 61X weighing 38,095 pounds for $23,652.62 (RX 16) and 17 heifers weighing 7,270 pounds in Columbia, Missouri, for $4,407.23 (CX 3, p. 10), for a total of 115 heifers (98 + 17 = 115) weighing 45,365 pounds (38,095 + 7,270 = 45,365) at a cost of $28,059.85 ($23,652.62 + $4,407.23 = $28,059.85), or $61.85 per cwt ($28,059.85 ÷453.65 = $61.85). The next day, September 29, 1978, respondent sold 115 heifers to Graf Cattle Company, Dixon, Illinois, for $65.39 per cwt at an invoice weight of 45,710 pounds (RX 22), which is an increase of 345 pounds (45,710 −45,365 = 345), or exactly 3 pounds per head (115 ×3 = 345).

I infer that respondent increased the purchase weight by 3 pounds per head, and fabricated the scale ticket (RX 20) and work-

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ing was done (T. 41)" (Respondent's Proposed Findings on Remand at 15, emphasis added), is slightly deceptive. The word "the," which I emphasized, taken in context, could give the erroneous impression that Mr. Meyer testified that he knew Saylor sorted the cattle involved here.

sheet (RX 21) (which attributes the increase to the removal of 7 head at Pittsfield from the 17 head Columbia lot and the substitution of 7 head from respondent's inventory)[169] to cover up his fraud, because of the same 12 circumstances (except numbers 2, 3, and 8) referred to in § IV(D), *supra*, relating to Transaction 6.

In addition, as stated in § I(F)(1), *supra*, I rely on the fact that respondent was buying for Graf Cattle Company for 25¢ per cwt commission, and sorting would have been inconsistent with such a commission transaction.

Moreover, as stated in § I(F)(2), I rely on the fact that Graf did his own sorting, and there is no evidence that Graf knew of, or approved of, any alleged sorting by respondent.

Respondent cheated Graf out of $219.39 by the 345-pound pencil-weight addition (3.45 ×$63.59 = $219.39). This was not one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $113.41 on this transaction ($.25 ×453.65 = $113.41).

Respondent's net profit with the padded weight was $373.01 (Expenses: $28,059.85, purchase price (RX 16; CX 3, p. 10); $634.13, transportation (CX 3, p. 13); $43.60, insurance (RX 22); Total expenses, $28,737.58; Respondent received $29,110.59 (RX 22); Net profit: $29,110.59 −$28,737.58 = $373.01). Subtracting respondent's weight-padding profit of $219.39 from his total profit of $373.01 would have resulted in a profit of $153.62 without weight padding, or $40.21 more than a legitimate order buyer's profit at 25¢ per cwt, which was the agreed-upon compensation to respondent in this transaction (see § I(E)(2), *supra*) ($153.62 −$113.41 = $40.21).

Hence this is a transaction in which respondent violated the duty owed to his purchaser, Graf Cattle Company, for whom he was acting as an agent in a position of trust, by charging more than the agreed-upon commission and padding the weight.

There is no relevant testimony by the trucker in this case. As shown in § I(F)(2), *supra*, the testimony by the customer is favorable to complainant.

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[169] Respondent's testimony is at Tr. 320-22, and Mrs. Manson's testimony is at Tr. 147-49, 197-99, 208, 235, 238-39.

XV. In Transaction 9, 10 Circumstances Lead Me to Infer that the 84 Steers Sold to Jerry Langdon, Jacksonville, Illinois, on October 13, 1978, Were the Same 84 Steers Purchased by Respondent in Kansas City the Day Before, to Which He Added 20 Pounds Per Head to the Average Per-Head Purchase Weight, and that Respondent's Worksheet (Attributing the Increase to Sorting Two Lots Accidentally Mixed) and Scale Ticket Were Fabricated to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,256.92 Enabled Him to Undercut a Legitimate Order Buyer by $3.22 Per Cwt, and Still Make $46.18 More than a Legitimate Order Buyer Would Have Made.

On October 12, 1978, respondent bought 84 steers as Kansas City Lot No. 69 weighing 37,680 pounds for $75.51 per cwt (RX 48).[170] The next day, October 13, 1978, respondent sold 84 steers to Jerry Langdon, Jacksonville, Illinois, for $73.29 per cwt at an invoice weight of 39,395 pounds (RX 51), which is an increase of 1,715 pounds (39,395 −37,680 = 1,715), or exactly 20 pounds per head on the average per-head weight (449 pounds (average per-head weight (RX 48)) + 20 = 469 pounds ×84 = 39,396 pounds, which rounds to 39,395 pounds, the invoice weight). I infer that respondent increased the purchase weight by 20 pounds per head on the average per-head weight, and fabricated the scale ticket (RX 49) and worksheet (RX 50) (which attributes the increase to an accidental mixing of Lot No. 68 and Lot No. 69)[171] to cover up his fraud, because of the same 12 circumstances (except numbers 4 and 10) referred to in § IV(D), *supra,* relating to Transaction 6.

Respondent overcharged Langdon $1,256.92 by the 1,715-pound pencil-weight addition (17.15 ×$73.29 = $1,256.92). However, without the weight padding, respondent would undoubtedly have increased his selling price considerably. This was one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer.

A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $94.20 on this transaction ($.25 ×376.80 = $94.20). Respondent's profit was $140.38, or only $46.18 more than a legitimate order buyer's profit at 25¢ per cwt commission (Respondent's expenses: $28,450.35, purchase price (RX 48); $282.60, transportation (CX 9, pp. 8–9); $43.30, insurance (RX 51); Total expenses, $28,776.25; Respondent received $28,916.63 (RX 51); Net profit: $28,916.63 −$28,776.25 = $140.38). Subtracting respondent's total

[170] $28,450.35 ÷376.80 = $75.51.

[171] Respondent's testimony is at Tr. 333–34, and Mrs. Manson's testimony is at Tr. 164–65, 236, 263–67.

profit of $140.38 from his weight-padding profit of $1,256.92 shows that respondent would have suffered a net loss of $1,116.54 without weight padding ($1,256.92 −$140.38 = $1,116.54).

Accordingly, respondent's weight padding here was so that he could undercut a legitimate dealer or order buyer. A legitimate dealer or order buyer seeking 25¢ per cwt profit or commission would have had to charge Langdon $76.51 per cwt ($75.51 purchase price + $.75 transportation (CX 9, pp. 8, 9) + $.25 commission). That would have been $3.22 more than respondent's invoice price to Langdon ($76.51 −$73.29 = $3.22). Hence, by padding the weight, respondent was able to undercut a legitimate dealer or order buyer by $3.22 per cwt, and still make $46.18 more than a legitimate dealer or order buyer would have made on the transaction.

There is no testimony by the customer in this transaction, and no relevant testimony by the trucker. Complainant concedes on remand that the truck went through Pittsfield enroute to the buyer. (A truck going from Kansas City to Jacksonville, Illinois, would necessarily pass through Pittsfield.) The trip sheet shows "Pittsfield, Ill." as the "ORIGIN," written in Mrs. Manson's "distinctive feminine handwriting" (CX 9, p. 8, reproduced in § V(A), *supra*).[172]

XVI. In Transaction 1, 12 Circumstances Lead Me to Infer that the 77 Steers Sold to Carroll Long, Pleasant Hill, Illinois, on August 11, 1978, Were the Same 77 Steers Purchased by Respondent in Kansas City the Day Before, to Which Respondent Added .5% by Pencil to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Two Head at Pittsfield) and Scale Ticket to Cover Up His Fraud. Respondent Cheated Long Out of $147.73 by Padding the Weight.

On August 10, 1978, respondent bought 77 steers in Kansas City weighing 46,285 pounds for $63.23 per cwt (RX 1).[173] On August 11, 1978, respondent sold 77 steers to Carroll Long, Pleasant Hill, Illinois, for $64.23 per cwt at an invoice weight of 46,515 pounds (RX 4), which is an increase of 230 pounds, or exactly .5% over respondent's purchase weight (.005 ×46,285 = 231.4, which rounds to 230; 230 + 46,285 = 46,515).

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[172] Respondent's attorney erroneously states that "[i]n transaction 9 the trucker wrote 'Pittsfield' on the trip sheet" (Respondent's Proposed Findings on Remand at 27).

[173] $29,264.20 ÷462.85 = $63.23.

I infer that respondent increased the purchase weight 230 pounds by pencil, and fabricated the scale ticket (RX 2) and worksheet (RX 3) (which attributes the increase to the removal of 2 animals at Pittsfield and the substitution of 2 others from respondent's inventory) [174] to cover up his fraud, because of the same 12 circumstances referred to in § IV(D), *supra*, relating to Transaction 6.

Respondent cheated Long out of $147.73 by the 230-pound pencil-weight addition (2.30 ×$64.23 = $147.73). This was not one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $115.71 on this transaction ($.25 ×462.85 = $115.71). Respondent's profit was $371.70 (Expenses: $29,264.20, purchase price (RX 1); $240.68, transportation (CX 1, p. 9); [175] $44.81, insurance (RX 4); Total expenses, $29,549.69; Respondent received $29,921.39 (RX 4); Net profit: $29,921.39 −$29,549.69 = $371.70). Subtracting respondent's weight-padding profit of $147.73 from his total profit of $371.70 would have resulted in a profit of $223.97, without weight padding, or $108.26 more than a legitimate order buyer's profit at 25¢ per cwt commission ($223.97 −$115.71 = $108.26).

Here, as in the case of most of the alleged reweighing transactions, I infer that the scale ticket was fabricated on the same day the 77 steers were sold to Long, so that the serial numbers would be in the proper sequence, and that the worksheet was fabricated sometime after January 29, 1979, when all of respondent's records were requested by complainant's investigators.

XVII. In Transactions 13, 10 and 11, Respondent's Carbon Copy of the Invoices Sent to Customers is Dated 1 to 4 Days After the Date on the Customer's Original Invoice. I Infer that Respondent Got Behind in Fabricating Scale Tickets, and Had Mrs. Manson Completely Rewrite the Invoices in Longhand, Changing Only the Dates, so that the Invoice Dates on Respondent's Carbon Copies Would Coincide with the Dates on the Scale Tickets. (Scale Tickets Are Purchased Prenumbered and Must Be Used in Proper Sequence, but Invoice Numbers Are Merely Typed by Mrs. Manson.)

The court states (723 F.2d at 583):

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[174] Respondent's testimony is at Tr. 306-08, 315-16, and Mrs. Manson's testimony is at Tr. 141-43, 207-08.

[175] Complainant failed to reduce the transportation charge of $300.85 by 20% (CX 1, p. 9) ($300.85 ×.8 = $240.68).

> The USDA also contends that the invoices and scale tickets prepared by Saylor and his employees "show signs that they were fabricated subsequent to the events themselves." However, the USDA points to nothing in the record to support this argument except an isolated incident of apparent misdating of an invoice.

I assume the court is referring to the invoice in Transaction 10, 1, or 13, in which transactions respondent's bookkeeper completely rewrote respondent's carbon copies of the invoices in longhand, hanging only the dates. Since the court refers to "an isolated incient of apparent misdating of an invoice," *i.e.*, just one invoice, presumably the court did not know that there are three transactions during a period of just 33 days involving the same "apparent misdating of an invoice."

Moreover, the court did not have before it the analysis set forth in §§ I–VI, *supra*, proving conclusively that respondent repeatedly fabricated worksheets and scale tickets to cover up weight padding.

In any event, however, a careful analysis of Transactions 10, 11, and 13 leads me to infer that respondent padded the weight in each transaction, and when respondent fell behind in fabricating the scale tickets, Mrs. Manson completely rewrote respondent's carbon copies of the invoices in longhand so that the scale ticket dates would correspond with the dates on respondent's copies of the invoices.

Assuming that respondent fell behind in fabricating scale tickets, he had to dummy up new invoices, postdated, since he would have used some of the serially numbered scale tickets in other transactions between the transaction date and the date he got around fabricating the scale tickets. Respondent must account for *every* scale ticket, and scale tickets must be used in proper serial number sequence (9 CFR § 201.73-1(d)(1), (2)). Hence respondent could not backdate scale tickets because that would be easily detected if there were a P&S investigation.

But when respondent dummied up new invoices to correspond with the date put on the fabricated scale tickets, that would not be detected from a routine audit of respondent's records. Respondent's records would look perfectly legitimate to a P&S investigator. Respondent's fraud could only be discovered if, as here, P&S obtained copies of the sales invoices from the buyer's records.

A. In Transaction 13, 12 Circumstances Lead Me to Infer that the 128 Steers Sold to Gordon Jones, Kirkland, Illinois, on November 28, 1978, Were the 117 Steers Purchased by Respondent the Day Before from Farmers & Traders Commission Company, Palmyra, Missouri, and 11 Steers Purchased at the Same Time from Palmyra Livestock Auction Market, to Which Respondent Added Exactly 3% by Pencil to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Use of 11 Head from Inventory Instead of the 11 Head Purchased at Palmyra) and Scale Tickets to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,814.35 Enabled Respondent to Undercut a Legitimate Order Buyer by $1.02 Per Cwt, and Still Make $880.23 More than a Legitimate Order Buyer Would Have Made.

1. On November 27, 1978, Respondent Purchased 117 Steers from Farmers & Traders Commission Co., Palmyra, Missouri, and 11 Steers from Palmyra Livestock Auction Market, for a Total of 128 Steers Weighing 92,375 Pounds, and Costing $60,742.59. Respondent Invoiced Gordon Jones, Kirkland, Illinois, the Next Day for 128 Steers Weighing 95,145 Pounds (Exactly 3% More than Respondent's Purchase Weight).

On November 27, 1978, respondent purchased 117 steers weighing 85,370 pounds from Farmers & Traders Commission Co., Inc., Palmyra, Missouri, at a cost of $56,091.32 (RX 67). On the same day, November 27, 1978, respondent purchased 11 steers from Palmyra Livestock Auction Market, Inc., Palmyra, Missouri. Respondent purchased the 11 steers in five groups, under the same buying number, "222," consisting of 2 head (RX 68A), 1 head (RX 68B), 3 head (RX 68C), 1 head (RX 68D), and 4 head (RX 68E). The total weight of the 11 steers was 7,005 pounds, and they cost respondent $4,651.27 (CX 13, p. 13).[176]

[176] Respondent also bought one additional steer from Palmyra Livestock Auction Market on November 27, 1978 (CX 13, p. 13), but that steer was purchased under a different buying number from number "222," which was used to purchase the 11 steers referred to above (CX 13, pp. 11-13).

The combined weight of the 128 steers (117 + 11 = 128) purchased by respondent in Palmyra, Missouri, on November 27, 1978, was 92,375 pounds (85,370 + 7,005 = 92,375), at a total cost of $60,742.59 ($56,091.32 + $4,651.27 = $60,742.59).

Respondent's original invoice to the buyer dated November 28, 1978, which was copied from the buyer's records, is reproduced on the next page (CX 13, p. 3). Respondent's carbon copy of the invoice for the same transaction dated 2 days later, November 30, 1978, is reproduced on the following page (RX 73; identical to CX 13, p. 1). The scale tickets dated November 30, 1978, are reproduced on the third page after this (RX 69-71).[177]

[177] Respondent's testimony as to Transaction 13 is at Tr. 336-37, and Mrs. Manson's testimony is at Tr. 171-73, 188-94, 237, 279-82.

Transaction 13 Invoice Copied From Buyer's Records (CX 13, p. 3)

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

December 28 19 78

SOLD TO Gordon Jones
Kirkland, Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT	
128	Stw	95145	65 50	62 319	98
	Ave Wt 743#			124	64
		308		62 444	62
	Neil Price				
	Truck - Earl Denny				

Signed

WE APPRECIATE YOUR PATRONAGE

ansaction 13 Invoice Copied From Respondent's Records (RX 73)

E[illegible] J. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

DATE October 30 19 78

SOLD TO [illegible]
Pittsfield Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT	
28	Str (Lt-Bal)	95145	65 50	62319	98
	Due Wt 743#	310	Dis	124	64
				62444	62
	Del Price				
	#02228				
	#02229				
	#02230				
	Pd Ck #-492-Pd Ck #549				
	Truck - Early [illegible]				

Respondent's Exhibit #73

957 311

Signed [illegible]

60,742.59 WE APPRECIATE YOUR PATRONAGE

Transaction 13 Scale Tickets (RX 69, 70, 71)

WEIGHT 19550

SAYLOR LIVESTOCK - Pittsfield, Illinois № [illegible]
SELLER [illegible] BUYER [illegible]
ADDRESS

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		26	Str

DATE 11-20-78 OFFICE COPY WEIGHER [illegible]

Respondent's Exhibit #69

WEIGHT 18680 18475

SAYLOR LIVESTOCK - Pittsfield, Illinois № [illegible]
SELLER [illegible] BUYER [illegible]
ADDRESS

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		25	Str
		25	Str

DATE 11-20-78 OFFICE COPY WEIGHER [illegible]

Respondent's Exhibit #70

WEIGHT 18595 18845

SAYLOR LIVESTOCK - Pittsfield, Illinois № 03309
SELLER Saylor BUYER Jones
ADDRESS

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		25	Str
		27	Str

DATE 11-20-78 OFFICE COPY WEIGHER [illegible]

Respondent's Exhibit [illegible]

Respondent's invoice to Gordon Jones for 128 steers weighing 95,145 pounds is for 2,770 pounds more than the purchase weight of the 128 steers purchased in Palmyra, Missouri, the day before (95,145 −92,375 = 2,770).[178] That is *exactly* 3% more than respondent's purchase weight of 128 steers the day before. That is, a person using a calculator to add exactly 3% to the purchase weight would read 2,771.25 on the calculator (.03 ×92,375 = 2,771.25), which rounds to 2,770.[178A]

Mrs. Manson testified that she was sure that respondent had an order for Mr. Jones when he purchased the 128 head of cattle. She testified (Tr. 192-93):

> Q. Do you know whether or not Mr. Saylor would have purchased 128 head of cattle if he didn't have a customer for them?
>
> A. If he didn't have a customer for them?
>
> Q. Yes.
>
> A. You are talking about cattle. He might have a dozen customer. I don't understand what you mean?
>
> Q. Does he buy cattle in the hopes that he will get an order at some later date for those cattle?
>
> A. He probably has an order for it but to classify if he would buy 128 head, you are going to have to explain to me if you mean all certain size, all certain quality——
>
> Q. That is not my question.

Livestock Auction Market were bought in five separate groups under the same buying number, number 222, showing that respondent was procuring exactly 11 head for a particular purpose, *i.e.*, to add to the 117 head purchased the same day in Palmyra.

> 2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Jones in Longhand, Changing Only the Date from November 28, 1978, to November 30, 1978, so that the Invoice Would Coincide with the Scale Tickets Fabricated after the Fact.

Mrs. Manson, respondent's bookkeeper, apparently concedes that she completely rewrote in longhand the invoice in Transaction 13.[179] She testified that she rewrote the invoice because when she wrote the original invoice to the customer, she was out of numbered invoices. She testified (Tr. 188–90):

> Q. Mrs. Manson, would you look at Complainant's Exhibit 13, please, Page 1, do you have it?
>
> A. Yes.
>
> Q. What date appears on that?
>
> A. November 30.
>
> Q. Look at Page 3, please, and what date appears on that?
>
> A. November 28.
>
> Q. These invoices cover the same sale of cattle, do they not?
>
> A. Yes, they do.
>
> Q. How would you explain the difference between the two dates?
>
> A. On Page 3 this invoice does not have a number on it, it is not a numbered invoice.

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[179] If respondent does not concede that his copy of the invoice was completely rewritten, a careful examination of the two invoices shows that although respondent's copy appears to be a mirror image of the original, there are a few differences that prove that it was completely rewritten. For example, the "I" in "Ins" has less of a loop on respondent's copy than on the buyer's original copy (JO Ref 308, p. 443; JO Ref. 310, p. 444). Also, the "G" in "Gordon" touches "TO" on respondent's copy but not on the buyer's copy (JO Ref. 307, p. 443; JO Ref. 309, p. 444).

Q. And what does that mean?

A. That means we were out of numbered invoices and when I made one up I just put that date on there.

Mrs. Manson's explanation as to why she completely rewrote the invoice in longhand is complete nonsense. Respondent's invoices are not purchased with numbers already appearing on the invoices. Respondent's invoice numbers are merely *typed* on the forms by Mrs. Manson (see Preliminary Statement (B), *supra*). Even if it is Mrs. Manson's practice to type the invoice numbers on a batch of invoice forms at one time, and even if she had run out of invoice forms which she had prenumbered with her typewriter when she wrote the Jones invoice on November 28, 1978, it would have made no sense at all to write out in longhand a complete new invoice to Gordon Jones and then type the invoice number on that rewritten invoice.

According to Mrs. Manson's story, on November 30, 1978, instead of merely typing the invoice number on her copy of the November 28, 1978, invoice to Jones, she (i) completely rewrote the invoice in longhand, and used the date of November 30, 1978 (instead of ascertaining the correct date, required to be used by the Act and regulations), (ii) presumably threw away the original copy of the rewritten invoice (since Jones had only the November 28, 1978, invoice), and (iii) typed the invoice number on the bottom of the rewritten invoice. That is so illogical as to be unbelievable.

If, for some particular reason, Mrs. Manson decided to let the invoice to Gordon Jones go before she took the time to find out what her next invoice number should be (*e.g.*, if the trucks were loaded and she wanted to send the invoice with one of the truck drivers),[180] there would have been no logical reason for completely rewriting the invoice in longhand when she got around to adding the invoice number. She would merely have typed the invoice number on her copy of the invoice at some later date.

Mrs. Manson testified that she could not tell whether this transaction occurred on November 28, 1978, or November 30, 1978, but she finally assumed it occurred on November 30, 1978. She testified (Tr. 189–90, 193–94):

Q. When did the transaction actually occur? Was it the 28th or was it the 30th?

A. I could not answer that right now.

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[180] Complainant concedes on remand that the trucks stopped in Pittsfield enroute to the customer in Transaction 13.

Q. Would it help to look at the scale ticket?

A. The scale tickets have the 30th.

Q. Would the scale tickets be dated the date on which the transaction occurred?

A. If the scale tickets were not dated I would have dated them the day I made out this invoice.

Q. Do you mean that you make up scale tickets and don't date them?

A. We have some that have not been dated but I can't say we make them up, we weigh the cattle and the dates are not put on them.

Q. So you weigh the cattle but don't put the date on them on the day you weigh the cattle?

A. No, that isn't what I said.

Q. What did you say?

A. You explain your question a little better.

Q. All right, do you weigh cattle, making up scale tickets and on the day that you weigh the cattle you do not enter the date on the scale ticket?

A. Making up scale tickets, no. We weigh the cattle. There are days, yes, that if we are busy the date might not have got wrote down on the scale tickets.

* * * * * * *

Q. It appears that he bought them on the 27th, or some portion of them on the 27th, and that they were paid for on the 28th. Now, it costs money to keep cattle and feed them, right?

A. Sure.

Q. And the more you move them around the more they shrink, right?

A. Not necessarily. Moving, yes, it causes a shrink, but if they are in a pen and they are fed well and watered, wo don't run them all around the place.

Q. If Mr. Saylor bought these cattle on the 27th would he wait until the 30th to ship them?

A. It depends on when the customer wanted them to be there and, again, you are talking in November, you are talking weather.

Q. You are telling us that we can't tell when this transaction occurred?

A. Well, you are talking about three or four years ago, no.

Q. I am talking about what the records say.

A. No, I can't.

I would assume it was on the 30th.

However, I find that the original invoice to Jones was written on November 28, 1978, rather than November 30, 1978, for the following six reasons: (i) the customer's original invoice is dated November 28, 1978 (CX 13, p. 3), (ii) respondent's worksheet is dated November 28, 1978 (RX 72),[181] (iii) Mr. Jones' check paying respondent for the 128 steers is dated November 29, 1978 (CX 13, p. 4), (iv) the trip sheet filled out by Denny Richards for half the load shows that it was transported on November 29, 1978 (CX 13, p. 15), (v) the trip sheet filled out by Earl Richards for the other half of the load shows that it was transported on November 29, 1978 (CX 13, p. 16), and (vi) Mrs. Manson's check stubs show payment to both truckers for transporting the steers on November 29, 1978 (CX 13, pp. 17, 20).

Accordingly, I find that Mrs. Manson wrote the invoice to the customer on November 28, 1978, and then completely rewrote the invoice in longhand on November 30, 1978, changing only the date to November 30, 1978, which is the same date as the scale tickets. I infer that she dummied up a new invoice dated November 30, 1978, in order to conceal respondent's addition of exactly 3% to the purchase weight, because, for some reason, the scale tickets were not fabricated until November 30, 1978.

Respondent cannot pass off the November 30 date on his copy of the Jones *invoice* in Transaction 13 as an inadvertent mistake since the only purpose to be served by dummying up a new invoice was so that the date could be changed, in order to lend an aura of authenticity to the scale tickets fabricated on November 30.

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[181] Even though I infer that the worksheet was fabricated sometime after respondent's records were requested on January 29, 1979, by complainant's investigators, the date of November 28, 1978, on the worksheet still shows that respondent concedes that the transaction occurred on November 28, 1978.

Similarly, respondent cannot pass off the November 30 date on the *scale tickets* in Transaction 13 as an inadvertent mistake since respondent went to the trouble (at great risk, if detected) of dummying up a sales invoice dated November 30 to correspond with the November 30 date on the scale tickets.

3. Mrs. Manson's "Estimate" of the "Raw Cost" of the 128 Steers in Transaction 13, Which She Wrote on Respondent's Postdated Carbon Copy of the Invoice to Jones, Is $60,742.59, the Exact Price Respondent Paid for the 117 and 11 Steers Purchased in Palmyra, Missouri. (According to Respondent's Worksheet, the 11 Steers Were Irrelevant to the Jones Transaction.)

Respondent paid $60,742.59 for the 128 steers purchased in Palmyra, Missouri, on November 27, 1978, bought in lots of 117 and 11 from two firms (see § XVII(A)(1), *supra*). That identical figure, "60,742.59," which is the sum of the price paid for the 117- and 11-head lots, was written by Mrs. Manson on the bottom left-hand corner of the postdated invoice to Jones in Transaction 13 (JO Ref. 311, p. 444). Mrs. Manson's action in writing the cost of those two lots on her copy of the Jones invoice is totally inconsistent with respondent's contention that the 11-head lot is irrelevant to the Jones transaction.

That is the exact situation we found in Transaction 4, where Mrs. Manson wrote the cost of Kansas City Lot No. 66 on her invoice to Graf, even though respondent contends that Lot No. 66 was completely irrelevant to the Graf transaction (see § I(C)(3)(b), *supra*).

Respondent's worksheet has a completely different total cost figure for the 128 steers than the figure used by Mrs. Manson. Respondent's worksheet is reproduced on the following page (RX 72).

Transaction 13 Worksheet (RX 72)

312 → 117 lb - 85370 - Jamison

313 → 6 lb -
314 → 5 lb -
128

9975 West Partner Gen 4

95145 #

315 → 117 - 85370 - 5609132
316 → 11 9775 - 5376 35
317 → 9146757

Doubling
6550 + 9ma
and know when this

Respondent's
Exhibit
7

Respondent's worksheet shows that the 128 steers sold to Jones on November 28, 1978, consisted of the 117 steers purchased the day before from Farmers & Traders Commission Company, Palmyra, Missouri (JO Ref. 312, p. 454), and 6 steers and 5 steers taken from respondent's inventory (West Pasture and Pen 4; JO Ref. 313, 314, p. 454). Respondent's worksheet then shows the exact cost of the 117 steers purchased from Farmers & Traders Commission Company, $56,091.32 (JO Ref. 315, p. 454), and the cost of the 11 steers allegedly added from inventory, $5,376.25 (JO Ref. 316, p. 454), for a total alleged cost of $61,467.57 (JO Ref. 317, p. 454).

However, Mrs. Manson's "raw cost" figure at the bottom of her postdated copy of the invoice to Jones, which allegedly was prepared from the worksheet, does not show the cost figure calculated by respondent on the worksheet. Rather, Mrs. Manson shows the exact cost of the 128 steers purchased in Palmyra, Missouri, the day before.

Here as in Transaction 4, Mrs. Manson's cost estimate at the bottom of her postdated copy of the invoice to Jones is a "smoking gun." This circumstance, standing alone, would lead me to infer that the 128 steers sold to Jones on November 28, 1978, were the same 128 steers purchased by respondent in Palmyra, Missouri, the day before.

4. Twelve Circumstances Lead me to Infer that Respondent Added Exactly 3% by Pencil to the Purchase Weight of the 128 Steers Purchased in Palmyra, Missouri, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud.

In drawing the inference that respondent padded his purchase weight in Transaction 13 by exactly 3%, and fabricated the worksheet and scale tickets to cover up his fraud, I rely primarily on the circumstance that Mrs. Manson completely rewrote the invoice in longhand, changing only the date, and on the circumstance that Mrs. Manson used the exact cost of the 128 steers purchased in Palmyra, Missouri, as her cost estimate of the steers, rather than the cost shown on respondent's worksheet.

In addition, I rely on the same 12 circumstances referred to in § IV(D), *supra*, relating to Transaction 6, except numbers 4, 5 and 9. I am not incorporating Circumstance 9 from Transaction 6, which relates to Mrs. Manson's cost estimate written on the invoices since here, as in Transaction 4, the cost estimate was used [illegible] *i.e.*, to show that the 11 steers purchased at [illegible]w before were the 11 steers relevant to

this transaction, rather than 11 steers allegedly taken from respondent's inventory. In other words, in order to avoid relying on the same "cost estimate" for two separate purposes, I am relying on it only for the stronger circumstance set forth in § XVII(A)(3), *supra*.

In addition, I rely on the circumstance that respondent's alleged substitution of 11 steers from inventory for the 11 steers purchased the day before at Palmyra, Missouri, would have destroyed the uniformity in weight desired by Mr. Jones. Mr. Jones testified that he buys livestock a pen at a time, consisting of about 110 head, sometimes more and sometimes less (Tr. 126-27). He testified that he also sells his livestock a pen at a time and does not permit any sorting by the buyer. Accordingly, he has instructed respondent to buy "approximately 110 cattle, weighing 700 to 750 pounds" (Tr. 128), so that they will all finish out at choice grade at the same time (Tr. 127-28).

The 11 steers purchased by respondent at Palmyra, Missouri, averaged 637 pounds (7,005 ÷ 11 = 637). This is only 63 pounds less than Mr. Jones' desired weight limit (700 − 637 = 63).

However, the 11 steers allegedly added by respondent from inventory weighed 9,775 pounds (JO Ref. 313, 314, p. 454), an average of 889 pounds. This is 139 pounds heavier than Mr. Jones' desired highest weight limit (889 − 750 = 139).[182] Hence the 11 steers allegedly added from respondent's inventory would have departed from the customer's desired weight limit by 2.2 times as much as the 11 steers purchased at Palmyra by respondent (139 ÷ 63 = 2.2). This is an additional circumstance which leads me to believe that respondent used the 11 steers purchased in Palmyra rather than the 11 steers allegedly added from inventory to ship to Jones.

5. Respondent's Weight-Padding Profit of $1,814.35 Enabled Him to Undercut a Legitimate Order Buyer by $1.02 Per Cwt, and Still Make $880.23 More than a Legitimate Order Buyer Would Have Made.

Respondent cheated Jones out of $1,814.35 by the 2,770-pound pencil-weight addition (27.70 × $65.50 = $1,814.35). However, this was one of the transactions where respondent padded the weight so

[182] Since the 11 steers purchased from Palmyra were lighter than Mr. Jones' desired weight limit, I have compared them with Mr. Jones' lightest limit, and since the 11 steers allegedly added from respondent's inventory were heavier than Mr. Jones' desired weight limit, I have compared them with the heavier limit. The same comparison would be shown if we compared each with an average figure of 725 pounds desired by Mr. Jones.

that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $230.94 on this transaction ($.25 ×923.75 = $230.94). Respondent's profit was $1,111.17, or 4.8 times the profit ($1,111.17 ÷$230.94 = 4.8) of a legitimate order buyer at 25¢ per cwt commission (Respondent's expenses: $56,091.32, purchase price of 117 steers (RX 67); $4,651.27, purchase price of 11 steers (CX 13, p. 13); $466.22, transportation (CX 13, pp. 17, 20); [183] $124.64, insurance (RX 73); Total expenses, $61,333.45; Respondent received $62,444.62 (RX 73); Net profit: $62,444.62 −$61,333.45 = $1,111.17). Subtracting respondent's total profit of $1,111.17 from his weight-padding profit of $1,814.35 would have resulted in a loss of $703.18, without weight padding.

A legitimate dealer or order buyer making 25¢ per cwt commission or profit would have had to charge Jones $66.52 per cwt on this transaction ($65.76 (purchase price) [184] + $.51 (transportation) [185] + $.25 (commission) = $66.52). Respondent charged Jones only $65.50 per cwt, or $1.02 less per cwt than a legitimate dealer or order buyer would have charged at 25¢ per cwt commission, and respondent still made $880.23 more than a legitimate dealer or order buyer would have made ($1,111.17 −$230.94 = $880.23).

B. In Transaction 10, 12 Circumstances Lead Me to Infer that the 63 Steers Sold to Bob Russell, Somonauk, Illinois, on October 26, 1978, Were the 63 Steers Purchased by Respondent the Same Day as Kansas City Lot No. 66, to Which Respondent Added 5 Pounds Per Head to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Five Head at Pittsfield) and Scale Tickets to Cover Up His Fraud. Respondent Cheated Russell Out of $203.81 by Padding the Weight.

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[183] $333.01 ×.7 = $233.11 ×2 = $466.22. (Note, my computations differ from complainant's chart because of rounding differences and because complainant did not reduce the $333.01 transportation charge by 30%, which is shown on Mrs. Manson's check stubs (CX 13, pp. 17, 20).

[184] $60,742.59 ÷923.75 = $65.76.

[185] $466.22 ÷923.75 = $.51.

1. On October 26, 1978, Respondent Purchased 63 Steers Weighing 44,905 Pounds as Kansaa City Lot No. 66. Respondent Invoiced Bob Russell, Somonauk, Illinois, the Same Day for 63 Steers Weighing 45,220 Pounds, an Increase of 315 Pounds, or 5 Pounds Per Head.

On October 26, 1978, respondent purchased 63 steers weighing 44,905 pounds as Kansas City Lot No. 66, at a cost of $28,380.48 (RX 52). Respondent's original invoice to the buyer dated October 26, 1978, which was copied from the buyer's records, is reproduced on the next page (CX 10, p. 2). Respondent's carbon copy of the invoice for the same transaction dated 4 days later, October 30, 1978, is reproduced on the following page (RX 56). The scale tickets dated October 30, 1978, are reproduced on the third page after this (RX 53, 54).[166]

[166] Respondent's testimony as to Transaction 10 is at Tr. 334, and Mrs. Manson's testimony as at Tr. 166-68, 194-97, 236, 268-74.

Transaction 10 Invoice Copied From Buyer's Records (CX 10, p. 2)

GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

DATE October 26 19 78

SOLD TO Bob Russell
Sommerville, Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT
63	Strs.	45220	64 70	24,252.34
	Live Wt 718#		Dns	43.89
				21,301.23
	Wel Price			
	145./head			
	Truck Delivery			

318

Signed

WE APPRECIATE YOUR PATRONAGE

Transaction 10 Invoice Copied From Respondent's Records (RX 56)

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

DATE [illegible] 20 19 78

SOLD TO Bob Russell
Lawrence [illegible]

NO.	KIND	WEIGHT	PRICE	AMOUNT	
1 C3	St. (KC)	45220	64.20	29,557	34
	Avg Wt 718#		Vice	43	89
				29,301	23

Del Price

Scale tickets # 02127
02128

Respondent's Exhibit # 56

Od Ch # 5337

Truck [illegible] 319

#2908

Signed

WE APPRECIATE YOUR PATRONAGE

Transaction 10 Scale Tickets (RX 53, 54)

WEIGHT
14905

SAYLOR LIVESTOCK - Pittsfield, Illinois № [illegible]
SELLER [illegible] BUYER [illegible]
ADDRESS

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		61	[illegible]

DATE 10-30 28 OFFICE COPY WEIGHER [illegible]

Respondent's Exhibit # 53

WEIGHT
16350
13965

SAYLOR LIVESTOCK - Pittsfield, Illinois № 02127
SELLER [illegible] BUYER [illegible]
ADDRESS

PRICE	AMOUNT	QUANTITY	DESCRIPTION
		23	Stw
		19	Stw

DATE 10-30 28 OFFICE COPY WEIGHER [illegible]

Respondent's exhibit # 54

Respondent's invoice to Bob Russell for 63 steers weighing 45,220 pounds is for 315 pounds more than the purchase weight of the 63 steers purchased in Kansas City the same day (45,220 −44,905 = 315). That is an increase of 5 pounds per head over respondent's purchase weight the same day (63 ×5 = 315).

2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Russell in Longhand, Changing Only the Date from October 26, 1978, to October 30, 1978, so that the Invoice Would Coincide with the Scale Tickets (Fabricated after the Fact).

It is obvious that Mrs. Manson, respondent's bookkeeper, completely rewrote in longhand the invoice in Transaction 10, changing only the date. Although respondent's copy appears to be a mirror image of the original, there are a few differences that prove that it was completely rewritten. For example, the loop on the "y" at the end of the truck driver's name is made differently on the two invoices (JO Ref. 318, p. 460; JO Ref. 319, p. 461).

Mrs. Manson testified that the invoice was rewritten because she had run out of numbered invoice forms. Specifically, she testified (Tr. 196–97, 270):

> Q. Mrs. Manson, when did this sale to Bob Russell occur?
>
> A. The invoice says the 30th.
>
> Q. After reviewing all the documents do you firmly believe that is the date on which it occurred?
>
> A. No. Like I said before, I think this one here has no date on it, or not date, invoice number. It was transferred over to an invoice with a number on it and the date was put on it.
>
> Q. So that means if it didn't occur on the 30th then the dates on the scale tickets aren't right either, are they?
>
> A. The scale tickets correspond with the invoice, the numbered invoice.
>
> Q. So if the date on the invoice is wrong the date on the scale tickets is wrong, is that correct?
>
> A. It could be, yes.

Q. By a parody [parity] of reasoning I submit to you that if the date on the invoice is wrong then the date on the tickets, which is the same date, must also be wrong, otherwise——

A. (Interrupting) I would assume. I don't claim to be perfect.

* * * * * * *

Q. Now, the work sheet has a date, October 27th on it,[183A] and the scale ticket has the date, October 30. When was this scale ticket made?

A. This was the one that we talked on yesterday. The scale ticket, evidently, at the time it was made, was not dated. And when I made out the invoice, the numbered invoice from Bob Russell, I dated the invoice for that day, along with the date on the scale ticket.

Mrs. Manson's claim that she completely rewrote this invoice longhand because she ran out of prenumbered invoice forms more utter nonsense—completely unbelievable (see § XVII(A) *supra*). For the reasons set forth above (§ XVII(A)(2), *supra*), I in that Mrs. Manson completely rewrote the invoice in Transaction because respondent got behind in fabricating the scale tickets Transaction 10.

3. Twelve Circumstances Lead me to Infer that Respondent Added 5 Pounds Per Head to the Purchase Weight of the 63 Steers Purchased the Same Day as Kansas City Lot No. 66, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud.

In drawing the inference that respondent padded his purchase weight in Transaction 10 by 5 pounds per head, and fabricated the worksheet and scale tickets to cover up his fraud, I rely primarily on the circumstance that Mrs. Manson completely rewrote the invoice in longhand, changing only the date.

In addition, I rely on the same 12 circumstances referred to § IV(D), *supra*, relating to Transaction 6, except numbers 5 and

[183A] October 27, the date on the worksheet (RX 55), is the day *after* the date the original invoice to the buyer, *i.e.*, October 26, (CX 10, p. 2).

In addition, I find as a fact that Mrs. Manson fabricated an additional document in this transaction to lend support to respondent's claim. The document referred to is set forth on the next page (RX 57), Mrs. Manson's check and check stub to the trucker are set forth on the following page (CX 10, p. 9), and the trip sheet is set forth on the third page following this (CX 10, p. 8).

Mrs. Manson's Computations for Transaction 10 (RX 57)

Invoice # 2908 Quincy Richards - Trucker

63 320 → 44905 @ 65
322 → 45220 @ 65
90125

321 → 291.88 from K.C. to Cuba
293.93 from Cuba to Louisiana
585.81

323 324 → 1.30 per 100 #
44905 | 585.81

Respondent's Exhibit # 57

5337

GEORGE W. SAYLOR, JR.
LIVESTOCK
P. O. BOX 287
PITTSFIELD, ILL. 62363

November 2 1978

70-637
812

PAY GEO. SAYLOR 1059 DOLS 10 CTS DOLLARS $1,059.10

TO THE ORDER OF Denny Richards Trucking

GEORGE W. SAYLOR, JR.
LIVESTOCK

NOT NEGOTIABLE

Farmers State Bank
Pittsfield, Illinois (236)

⑆082⑈0637⑆ ⑈40⑈026⑈ 21⑈

325

GEORGE W. SAYLOR, JR.
PITTSFIELD, ILL.

DELUXE - FORM WVD-2 V-BPL

DATE	HD	KIND	WT.	CWT		AMOUNT
10 26 78	K.C.	Somerset	63 Strs	45305 @ 1.30		589 77
10 28 78	Cattle	Lid	43 Strs	43651 @ 70		305 56
10 30 78	Cattle	Rochelle	35 Strs	38858 @ 65		252 58
10 31 78	Cattle	Chicago	36 Strs	44650 @ 65		290.23
			177 Hd			1,432.14
					Less 25%	358.04
					Less Ins	15.00
						1,059.10
					TOTAL	

Transaction 10 Trip Sheet (CX 10, p. 8)

TRIP SHEET

GEORGE W. SAYLOR

LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE: (217) 285-6184 (217) 285-4011

Date 10/26 Pro

Driver Co-Driver's Name

CONSIGNEE SHIPPER Tractor No. 1

DESTINATION ORIGIN Trailer No. 18

Quantity	Description	Weight	OFFICE USE
13	#2908 (K.C.)	45300 @ 1.30	Rate
		44905	%
		58377	Amt.

MILES RUN IN FOLLOWING STATES ON THIS TRIP:

MISSOURI LOADED 195 LOADED

EMPTY 195 EMPTY

ILLINOIS LOADED 296 LOADED LOADED

EMPTY 256 EMPTY EMPTY

SPECIAL REMINDERS:

DO — WEIGH LOAD AND BE LEGAL

DO — TURN IN LOGS WITH EACH TRIP SHEET AND KEEP UP TO DATE!

Mrs. Manson's testimony with respect to her document (RX 57) is as follows (Tr. 271–73):

Q. Now, yesterday you explained to us how the trucker involved in this case was paid and, as I understand it, that is shown by Respondent's Exhibit 57?

A. Yes.

Q. And that is that he was paid $585.81?

A. He was paid off of the Kansas City weight at $1.30 a hundred pounds.

Q. My question was, does this exhibit show how much Mr. Richards was paid?

A. This exhibit shows how I derived at paying Mr. Richards.

Q. My question is, does this exhibit show how much Mr. Richards was paid?

A. I would have to look at the check to see what he was paid.

Q. Then, the answer to my question is no?

A. I don't know unless I would see his actual check.

Q. Mrs. Manson, my question is, does this exhibit tell us how much you paid Mr. Richards for this load?

A. I have answered that question the best I know how.

Q. Is it fair for us to conclude, on the basis of this exhibit, that you paid Mr. Richards $585.81?

A. This is the way I figured it, yes.

Q. Mrs. Manson, would you look at Complainant's Exhibit 10, please, Page 9. Now, this check is written to Denny Richards Trucking on November 2nd, is that right?

A. Yes.

Q. And the first entry at the bottom, it says, "10/26 K. C. SoMosomauk [Somonauk], 63 steers, 44,905 at $1.30, $583.07" [$583.77], right?

A. Right.

Q. Respondent's [Complainant's] Exhibit I0, Page 8 [trip sheet], shows 63 steers, consignee Bob Russell, weight 44,520 [45,220], crossed-out to 44,905, $1.30, $583.77, right?

A. Right.

Q. How much did you pay Mr. Richards to haul those 63 steers to DeCalb, Illinois?

A. What it says on the check.

Q. $583.07 [$583.77], right?

A. Yes.

Q. So, the work sheet showing $585.81, what does that tell us?

A. That tells you how I derived at how to pay him. Thursday is the end of pay period, and he didn't have the trip finished, he wanted it in on that week's pay and, as I explained on this work sheet, the weight that came from Kansas City to Pittsfield, the weight that left Pittsfield and went to Somonauk, took the weight, divided it into that money and it come out $1.30 a hundred, so I paid him off Kansas City's weight at $1.30 a hundred so he could have that money on that week's pay check.

Here, again, I find Mrs. Manson's explanation of her business practice to be utter nonsense, for a number of reasons.

First, this document is unique, as far as this record shows. There are many instances in this record of payments to truckers at a certain price per cwt, including the identical price of $1.30 per cwt paid to Earl Richards for hauling the 55 steers weighing 45,350 pounds in Transaction 4 from Kansas City to Dixon, Illinois (CX 4, pp. 7, 8), and $1.40 per cwt paid to M&I Truck Line, Inc., for the II5 heifers hauled in Transaction 3 from Kansas City to Dixon, Illinois (CX 3, p. 13). Yet there is no other comparable document by Mrs. Manson for any of the other transactions.

Second, Mrs. Manson's computations would indicate that the trucker should have been paid $585.81 (JO Ref. 323, p. 466), but the trucker was actually paid only $583.77 (JO Ref. 325, p. 467; JO Ref. 326, p. 468).

Third, if Mrs. Manson had used her document to compute the rate of $1.30 per cwt to be paid to the trucker, she would have computed the rate based upon the actual weight of the livestock allegedly hauled from Pittsfield—not on the basis of a computed weight that includes shrink. That is, Mrs. Manson used the *actual* weight

of the 63 steers purchased in Kansas City, *viz.*, 44,905 pounds, in making her computation for hauling the 63 steers from Kansas City to Pittsfield (JO Ref. 320, p. 466), but she used the *invoice* weight to the customer, *i.e.*, 45,220 pounds, in making her computation for hauling the 63 steers from Pittsfield to Somonauk, Illinois (JO Ref. 322, p. 466).

However, according to respondent's worksheet for Transaction 10, the actual weight of the 63 steers shipped from Pittsfield was only 43,860 pounds (RX 55), [187] or 1,360 pounds less than the invoice weight to the customer (45,220 −43,860 = 1,360). It makes sense to invoice the customer at a weight which includes shrink, in a transaction in which the purchase weight is transferred to the customer (with appropriate explanations on the invoice), but it makes no sense at all to include shrink, or "phantom" weight, in computing the rate to be charged to the trucker.[188]

If Mrs. Manson had used the actual weight allegedly hauled from Pittsfield to Somonauk, 43,860 pounds, and multiplied that by 65¢ per cwt, that would have equaled $285.09, which added to the $291.88 (JO Ref. 321, p. 466) would have equaled $576.97. Dividing that figure, $576.97, by the cwt (449.05) would have resulted in a rate of $1.28 per cwt, rather than $1.30, as computed by Mrs. Manson (JO Ref. 324, p. 466).

Multiplying the original Kansas City purchase weight of 44,905 pounds by $1.28 per cwt would have resulted in a total hauling charge of only $574.78, rather than $583.77, which resulted from Mrs. Manson's rate of $1.30 per cwt (JO Ref. 325, p. 467; JO Ref. 326, p. 468).

Although the hauling charge computed at $1.28 per cwt is only $8.99 less than the hauling charge computed at $1.30 per cwt ($583.77 −$574.78 = $8.99), if Mrs. Manson had really computed the trucking rate per cwt in the manner she claims, she would

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[187] According to respondent's worksheet for Transaction 10, the Pittsfield arrival weight of the 63 steers was 43,420 pounds, from which one plain steer weighing 820 pounds was removed and four "Horns" were removed weighing 2,600 pounds, leaving 40,000 pounds (43,420 −820 −2,600 = 40,000). Respondent allegedly added five steers from inventory weighing 3,860 pounds, resulting in a total alleged weight transported from Pittsfield to the customer of only 43,860 pounds.

[188] In this respect, the trip sheet showed only 44,905 pounds (CX 10, p. 8), so the trucker would not have expected any computations to be based on the invoice weight of 45,220 pounds. In fact, after allegedly using the *invoice* weight of 45,220 pounds to compute the $1.30 per cwt rate of payment, Mrs. Manson multiplied that rate ($1.30) by the actual purchase weight (44,905 pounds) to arrive at the total amount to be paid to the trucker ($583.77) (see JO Ref. 325, p. 467, and figures immediately to the left thereof).

have used the actual weight allegedly hauled from Pittsfield to Somonauk, saving respondent $8.99 in transportation costs.

For the foregoing reasons, I find that Mrs. Manson's document was fabricated, and I infer it was fabricated for the sole purpose of bolstering respondent's claim as to this transaction. Mrs. Manson's fabricated document is another circumstance which leads me to infer that respondent added 5 pounds per head to the purchase weight of the 63 steers which he purchased in Kansas City on the same day he invoiced Russell in Transaction 10.

In addition, although I am not including this as a separate circumstance, the customer in Transaction 10, Mr. Russell, testified that he bought cattle "weighing approximately 625 pounds to 750 pounds" (Tr. 123), but the *average* weight of the five steers allegedly added was 772 pounds (RX 55) (3,860 ÷5 = 772), or an *average* of 22 pounds more than Russell's *highest* desired weight.

Respondent's scale tickets for Transaction 10 show three printed weights totalling 45,220 pounds, the weight invoiced to Russell (RX 53, 54, 56). However, according to respondent's worksheet, the 63 steers sent to Russell actually weighed only 43,860 pounds at Pittsfield (RX 55). In addition, the scale tickets are dated October 30, 1978, even though the transaction occurred on October 26, 1978. I infer that the scale tickets were printed on October 30, 1978, with no livestock on the scale to cover up respondent's addition of 5 pounds per head to the purchase weight of the 63 steers he sold to Russell on October 26, 1978.

4. Respondent Cheated Russell Out of $203.81 by Padding the Weight.

order buyer's profit at 25¢ per cwt commission ($235.22 −$112.26 = $122.96).

C. In Transaction 11, 12 Circumstances Lead Me to Infer that the 79 Steers Sold to Rodhouse Bros., Pleasant Hill, Illinois, on November 6, 1978, Were the 79 Steers Purchased by Respondent's Agent Two Days Before, to Which Respondent Added 35 Pounds Per Head to the Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of 26 Head at Pittsfield) and Scale Tickets to Cover Up His Fraud. Respondent's Weight-Padding Profit of $1,741.95 Enabled Him to Undercut a Legitimate Order Buyer by $2.23 Per Cwt, and Still Make $679.95 More than a Legitimate Order Buyer Would Have Made.

1. On November 4, 1978, Respondent's Agent Purchased 79 Steers Weighing 47,670 Pounds. Respondent Invoiced Rodhouse Bros., Pleasant Hill, Illinois, Two Days Later for 79 Steers Weighing 50,435 Pounds, an Increase of 2,765 Pounds, or 35 Pounds Per Head.

On November 4, 1978, respondent's agent purchased 79 steers weighing 47,670 pounds at a cost of $30,684.27 (RX 58). Respondent's original invoice to the buyer dated November 6, 1978, which was copied from the buyer's records, is reproduced on the next page (CX 12, p. 2). Respondent's carbon copy of the invoice for the same transaction dated the next day, November 7, 1978, is reproduced on the following page (RX 62). The scale tickets dated November 7, 1978, are reproduced on the third page after this (RX 53, 54).[190]

[190] Respondent's testimony as to Transaction 11 is at Tr. 334-35, and Mrs. Manson's testimony is at Tr. 168-69, 177-79, 237, 274-77.

Transaction 11 Invoice Copied From Buyer's Records (CX 12, p. 2)

GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

327

PHONE (217) 285-6186
(217) 285-4011

DATE November 6 1928

SOLD TO Rodhouse Bros
Pleasant Hill Illinois

NO.	KIND	WEIGHT	PRICE	AMOUNT
79	Strs	50435	62.00	31,274.05
	Ave Wt 638#		Ins	63.55
				31,837.60
	Del Price			
	Truck - Mule			

Signed _____

WE APPRECIATE YOUR PATRONAGE

Transaction 11 Invoice Copied From Respondent's Records (RX 62)

GEORGE W. SAYLOR
LIVESTOCK ORDER BUYERS
P.O. BOX 287
PITTSFIELD, ILLINOIS 62363

PHONE (217) 285-6186
(217) 285-4011

328

DATE [illegible] 7 19 28

SOLD TO [illegible]

NO.	KIND	WEIGHT	PRICE	AMOUNT
77	[illegible] (Adams)	50455	6310	31724 65
	Trucking 1.88			63 55
				31787 60

Respondent's Exhibit #62

Ticket's #02131 #02132

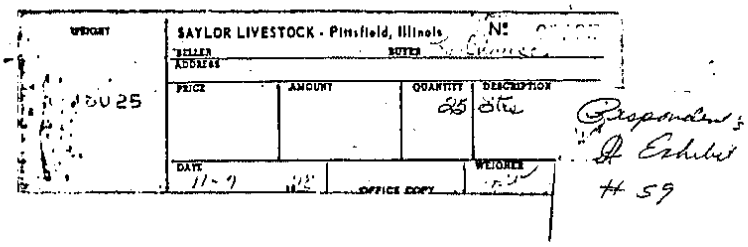
Truck - [illegible]

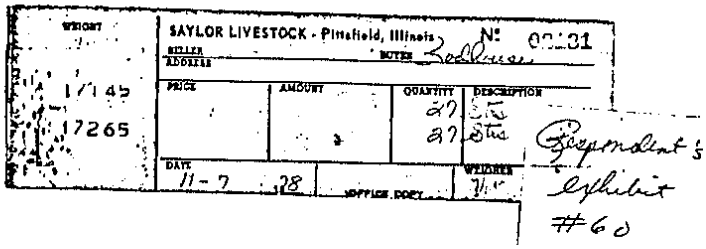
#2923

Signed

WE APPRECIATE YOUR PATRONAGE

Transaction 11 Scale Tickets (RX 59, 60)


WEIGHT
SAYLOR LIVESTOCK - Pittsfield, Illinois
No.
SELLER
BUYER
ADDRESS
PRICE
AMOUNT
QUANTITY
DESCRIPTION
25 Stu
DATE
11-7
OFFICE COPY
WEIGHER
Respondent's Exhibit #59


WEIGHT
17145
17265
SAYLOR LIVESTOCK - Pittsfield, Illinois
No.
SELLER
BUYER
ADDRESS
PRICE
AMOUNT
QUANTITY
DESCRIPTION
27 Stu
27 Stu
DATE
11-7
OFFICE COPY
WEIGHER
Respondent's Exhibit #60

Respondent's invoice to Rodhouse Bros. for 79 steers weighing 50,435 pounds is for 2,765 pounds more than the purchase weight of the 79 steers purchased by respondent's agent two days before (50,435 −47,670 = 2,765).[191] That is an increase of 35 pounds per head over respondent's purchase weight (79 ×35 = 2,765).

2. I Infer that Mrs. Manson Completely Rewrote the Invoice to Rodhouse Bros. in Longhand, Changing Only the Date from November 6, 1978, to November 7, 1978, so that the Invoice Would Coincide with the Scale Tickets (Fabricated after the Fact.)

Mrs. Manson testified that she did not believe that two invoices were written in Transaction 11, and that the transaction actually occurred on November 7, 1978. She testified (Tr. 177–79):

> Mrs. Manson, calling your attention to Page 2 of that exhibit [CX 12], do you notice the date on that of November 6, 1978?
>
> A. Yes, I do.
>
> Q. Calling your attention to Page 1, the date on the billing on that is November 7, 1978?
>
> A. Yes.
>
> Q. Can you explain why there were two bills made on that?
>
> A. I do not believe there was two bills made on it. I think it was just an error in the dates.
>
> Q. Now, calling your attention to the serial numbers on the bills, is there a serial number on the November 6th bill?
>
> A. No, there is not.
>
> Q. Is there a serial number on the other bill?
>
> A. Yes, there is.

[191] Note that the scale ticket numbers appear only on respondent's postdated carbon copy of the invoice, not on the original copy sent to the buyer. Hence, as shown above, respondent's attorney's argument that it would have been virtually impossible to fabricate the scale tickets after the fact is specious (see Preliminary Statement (B), *supra*).

Q. Now, does that refresh your memory as to what might have occurred on that?

A. On this load, I believe Jerry Rodhouse was present when it was sorted. We probably had weighed the cattle up the day he was there and I gave him a blank invoice, representing what it would be, and sent it home with him. The original invoice was made up.

Q. Actually, the invoice that should be the correct one is the one with the serial number on the bottom, "2923"?

A. Yes.

Q. You will notice the deposit slip in here, being on Page 4. What is the date that the money from the Rodhouses was deposited?

A. On the 7th.

Q. So you feel the 7th was the actual day this transaction occurred?

A. Yes.

However, it is obvious that Mrs. Manson, respondent's bookkeeper, completely rewrote in longhand the invoice in Transaction 11, changing only the date. Although respondent's copy is, in the main, a mirror image of the original, the original shows the buyer as "Rodhouse Bros" (JO Ref. 327, p. 476), while respondent's carbon copy shows the buyer as "Louis Rodhouse & Bros" (JO Ref. 328, p. 477).

I find that the November 6 date is the correct date of this transaction, rather than November 7, since the trip sheet, written in Dorothy Manson's "distinctive feminine handwriting," shows that the 79 head of livestock were transported from Pittsfield, Illinois, to Pleasant Hill, Illinois, on November 6, 1978 (CX 12, p. 13), the buyer's check signed by Fred Rodhouse is dated November 6, 1978

3. Twelve Circumstances Lead me to Infer that Respondent Added 35 Pounds Per Head to the Purchase Weight of the 79 Steers Purchased 2 Days Before, and Fabricated the Worksheet and Scale Tickets to Cover Up His Fraud.

In drawing the inference that respondent padded his purchase weight in Transaction 11 by 35 pounds per head, and fabricated the worksheet and scale tickets to cover up his fraud, I rely primarily on the circumstance that Mrs. Manson completely rewrote the invoice in longhand, changing only the date.

I also rely on the same 12 circumstances referred to in § IV(D), *supra*, relating to Transaction 6, except numbers 5 and 9.

In addition, I rely on the fact that respondent's alleged substitution of 26 steers would have drastically destroyed the uniformity of the load. According to respondent's worksheet, he used 53 head of the 79 purchased, with a Pittsfield average weight of 562 pounds (RX 61) (29,780 ÷53 = 562). The 26 head allegedly added from inventory averaged 737 pounds (RX 61) (19,170 ÷26 = 737), or an average of 175 pounds more per animal (737 −562 = 175). That tremendous difference is an additional circumstance leading me to infer that respondent merely added 35 pounds per head to his purchase weight in Transaction 11.

Although Gerald Rodhouse (who is the brother of Fred Rodhouse, who signed the check for Transaction 11 on November 6, 1978), testified that he was present or assisted in sorting these 79 steers on November 7, 1978, his testimony is contradicted by two or three salient facts (see § XI, *supra*), and, therefore, I believe that he was recalling a transaction different from the transaction involved here.

4. Respondent's Weight-Padding Profit of $1,741.95 Enabled Him to Undercut a Legitimate Order Buyer by $2.23 Per Cwt, and Still Make $679.95 More than a Legitimate Order Buyer Would Have Made.

Respondent cheated Rodhouse Bros. out of $1,741.95 by the 2,765-pound pencil-weight addition (27.65 ×$63.00 = $1,741.95). However, this was one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $119.18 on this transaction ($.25 ×476.70 = $119.18). Respondent's profit was $799.13, or 6.7 times the profit ($799.13 ÷$119.18 = 6.7) of a legitimate order buyer at

25¢ per cwt commission (Respondent's expenses: $30,684.27, purchase price (RX 58); $290.65, transportation (CX 12, pp. 11, 13, 14);[192] $63.55, insurance (RX 62); Total expenses, $31,038.47; Respondent received $31,837.60 (RX 62); Net profit: $31,837.60 −$31,038.47 = $799.13). Subtracting respondent's total profit of $799.13 from his weight-padding profit of $1,741.95 would have resulted in a loss of $942.82, without weight padding.

A legitimate dealer or order buyer making 25¢ per cwt commission or profit would have had to charge Rodhouse Bros. $65.23 per cwt on this transaction ($64.37 (purchase price)[193] + $.61 (transportation)[194] + $.25 (commission) = $65.23). Respondent charged Rodhouse Bros. only $63.00 per cwt, or $2.23 less per cwt than a legitimate dealer or order buyer would have charged at 25¢ per cwt commission, and respondent still made $679.95 more than a legitimate dealer or order buyer would have made ($799.13 −$119.18 = $679.95).

XVIII. In Transaction 12, Eight Circumstances Lead Me to Infer that the 21 Steers Sold to Rodhouse Bros., Pleasant Hill, Illinois, on November 18, 1978, Were the Same 21 Steers Purchased by Respondent in Kansas City 2 Days Before, to Which He Added 20 Pounds Per Head to the Average Per-Head Purchase Weight, and that Respondent Fabricated the Worksheet (Attributing the Increase to the Substitution of Three Head at Pittsfield) and Scale Ticket to Cover Up His Fraud. Respondent's Weight-Padding Profit of $278.86 Enabled Him to Undercut a Legitimate Order Buyer by $1.77 Per Cwt, and Still Make $51.44 More than a Legitimate Order Buyer Would Have Made.

On November 16, 1978, respondent bought 21 steers at Kansas City Lot No. 66 weighing 12,850 pounds, or 612 pounds average, for $65.82 per cwt (RX 63).[195] Two days later, November 18, 1978, respondent sold 21 steers to Rodhouse Bros., Pleasant Hill, Illinois, for $64.85 per cwt at an invoice weight of 13,280 pounds (RX 66), which is an increase of 430 pounds, or 20 pounds per head on the

[192] $357.53 ×.75 = $268.15 + $22.50 = $290.65. (Note, my computations differ from complainant's chart because of rounding differences and because complainant did not reduce the $357.53 transportation charge by 25%, which is shown on Mrs. Manson's check stub (CX 12, p. 11), and complainant did not add the $30 transportation charge from Pittsfield to Pleasant Hill (CX 12, pp. 13, 14), reduced by 25% (CX 12, p. 14), *i.e.*, to $22.50 ($30 ×.75 = $22.50.)

[193] $30,684.27 ÷476.70 = $64.37. (Note, the average cost of $63.87 shown on RX 58 is before the commission charge of $238.35 was added by respondent's agent.)

[194] $290.65 ÷476.70 = $.61.

[195] $8,458.03 ÷128.50 = $65.82.

average per-head weight (612 + 20 ×21 = 13,272, *i.e.*, 8 pounds less than the invoice weight). I infer that respondent increased the purchase weight by exactly 20 pounds per head on the average per-head weight (and rounded up to 13,280 instead of down to 13,270), and fabricated the scale ticket (RX 64) and worksheet (RX 65) (which attributes the increase to the removal of three head at Pittsfield and the substitution of three others from respondent's inventory) [196] to cover up his fraud, because of the same 12 circumstances (except numbers 2-5) referred to in § IV(D), *supra*, relating to Transaction 6.[196A]

There is no relevant testimony by the truckers in this case. Since there were two trucking companies involved, one from Kansas City to Pittsfield and the other from Pittsfield to Pleasant Hill, Illinois, it is certain that the 21 steers stopped at Pittsfield enroute to the customer.

The testimony of the customer, although highly favorable to respondent, is given no weight because his testimony as to a salient fact is contradicted by documentary evidence and the testimony of respondent and Mrs. Manson (see § XI, *supra*).

Respondent cheated Rodhouse Bros. out of $278.86 by the 430-pound pencil-weight addition (4.30 ×$64.85 = $278.86). However, this was one of the transactions where respondent padded the weight so that he could undercut the price charged by a legitimate dealer. A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $32.13 on this transaction ($.25 ×128.50 = $32.13). Respondent's profit was $83.57 (Expenses: $8,458.03, purchase price (RX 63); $70.48, transportation; [197] $17.22, insurance (RX 66); Total expenses, $8,545.73; Respondent received $8,629.30 (RX 66); Net profit: $8,629.30 −$8,545.73 = $83.57). Subtracting respondent's total profit of $83.57 from his weight-padding profit of $278.86 would have resulted in a loss of $195.29 without weight padding ($278.86 −$83.57 = $195.29).

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[196] Respondent's testimony is at Tr. 335-36, and Mrs. Manson's testimony is at Tr. 169-71, 236-37, 277-79.

[196A] The reliance on Circumstance number 1 in this and other transactions where the weight increase was not exactly 2% or 3% is based on the fact that the weight increase fits into the "neat formula" discussed in § XII(A), *supra*, cited in Circumstance 1.

[197] The transportation charge to Pittsfield was 55¢ per cwt, less 30% (CX 11, p. 8), or $49.48 ($.55 ×128.50 = $70.68 ×.7 = $49.48). The transportation charge from Pittsfield to Pleasant Hill was $30, less 30% (or $21.00) (CX 11, p. 11), for a total of $70.48 ($49.48 + $21.00 = $70.48). Complainant's chart shows transportation costs of $158.50 for Transaction 12. (Presumably, complainant erroneously construed the figure of 12850 (pounds) at the bottom of CX 11, p. 8, as the transportation cost of $128.50, to which complainant added $30 (CX 11, pp. 10, 11)).

A legitimate dealer or order buyer making 25¢ per cwt commission or profit would have had to charge Rodhouse Bros. $66.62 per cwt on this transaction ($65.82 (purchase price) + $.55 (transportation) (*i.e.*, $.55 ×128.50 = $70.68) + $.25 (commission) = $66.62). Respondent charged Rodhouse Bros. only $64.85 per cwt, or $1.77 per cwt less than a legitimate dealer or order buyer would have charged at 25¢ per cwt commission ($66.62 −$64.85 = $1.77), and respondent still made $51.44 more than a legitimate dealer would have made ($83.57 −$32.13 = $51.44).

XIX. The 8-Month Suspension Order and $10,000 Civil Penalty Imposed in This Case Are Much Too Lenient for Respondent's Wilful, Flagrant and Repeated Violations.

A. Respondent's Wilful, Flagrant and Repeated Violations Warrant a 5-Year Suspension Order.

Respondent's violations in this case were exceptionally flagrant. Arbitrarily adding weight by pencil is one of the most unfair and deceptive practices that can be committed in violation of the Packers and Stockyards Act (see the cases cited in § VII(A), note 93, *supra*). Respondent's weight-padding violations are summarized in the table set forth on the following page.

SUMMARY OF RESPONDENT'S VIOLATIONS

Transaction No.*	Customer	Invoice Sale Date	Respondent's Net Profit	Legitimate Order Buyer's Profit at 25¢ Per Cwt	Amount by Which Respondent's Profit Exceeded Legitimate Order Buyer's Profit	Respondent's Weight-Padding Profit	Amount Per Cwt by Which Respondent Could Have Undercut a Legitimate Order Buyer	Commission Overcharge
		8/11/78	$371.70	$115.71	$255.99	$147.73	$—	$—
1	Carroll Long	9/1/78	873.52	66.83	806.69	336.25	—	470.44
5	M.H. Gentry	9/14/78	1,639.96	109.43	930.53	625.45	—	—
6	Don Adams	9/15/78	891.94	105.38	786.56	558.12	—	—
2	Carroll Long	9/29/78	373.01	113.41	259.60	219.39	—	40.21
3	Graf Cattle Co.	9/29/78	888.24	115.38	772.86	885.98	.25	—
7	William F. Meyer	10/6/78	613.95	113.38	500.57	852.04	.78	—
4	Graf Cattle Co.	10/13/78	3,289.51	327.28	2,962.23	377.00	—	—
8	Roger Jennings	10/13/78	140.38	94.20	46.18	1,256.92	3.22	—
9	Jerry Langdon	10/26/78	439.03	112.26	326.77	203.81	—	—
10	Bob Russell	11/6/78	799.13	119.18	679.95	1,741.95	2.23	—
11	Redhouse Bros.	11/18/78	83.57	32.13	51.44	278.86	1.77	—
12	Redhouse Bros.	11/28/78	1,111.17	230.94	880.23	1,814.35	1.02	—
13	Gordon Jones	12/2/78	327.13	135.08	192.05	648.76	.85	—
14	Lee L. Lowder, Jr.							
	Total		$11,242.24	$1,790.59	$9,451.65	$9,946.61		

* Arranged in chronological order of invoice sales dates. Source: §§ I–VI, XIII–XVIII, *supra*.

A legitimate order buyer charging 25¢ per cwt commission would have made a profit of $1,790.59 in the 14 transactions involved here. Respondent's profit was $11,242.24, or $9,451.61 more than a legitimate order buyer would have made charging 25¢ per cwt commission. That is almost identical to the profit of $9,946.61 respondent made from padding his purchase weights in the 14 transactions involved here.

In addition, respondent charged excessive commissions to two of his customers while also padding his purchase weights in their transactions.

Respondent's motive for his weight padding was to make an additional profit in each transaction and, in some cases, to keep his customers, or attract new customers, by undercutting the sales price that a legitimate order buyer or dealer making 25¢ per cwt would have had to charge. For example, in seven of the transactions, respondent's weight-padding profit enabled him to undercut the price per cwt that a legitimate order buyer making 25¢ per cwt would have had to charge by various amounts ranging from 25¢ per cwt to $3.22 per cwt.

The testimony of Mr. Lowder, the customer in Transaction 14, indicates that he buys from respondent because respondent can undercut other dealers. Mr. Lowder testified (Tr. 64):

> Q. What was the nature of the agreement? I'd like to get a little clarity of the agreement between you and Mr. Saylor. Could you explain that to us?
>
> A. Nothing much was said. I've seen quite often, you've seen quite often "Kansas City. For Sale", and I said I thought these calves were just a little high, and he said, "I can probably get calves like you've been buying and deliver them at your place under what you'd have to pay for them here," and I said, "If you can, that's fine. Just go hop to it," and that was all that was ever said. He'd send me the bill, and I'd mail him the check; or else the bill came on the truck and the trucker was going back, I'd give the check to the trucker and he'd take it back to Mr. Saylor, and Mr. Saylor was good to his word.

In other words, as a result of petitioner's practice of padding the weight, the "price could be lowered to undersell competitors, competing dealers, and also, it was unfair and deceptive to the customers who were buying the livestock at the inflated weight" (Tr. 372).

Livestock dealers such as respondent are faced with severe competition. For example, in the North Central region, which includes Illinois (Williams and Stout, *Economics of the Livestock-Meat In-*

dustry 36 (1964)), the competitive situation is described as follows (*id.* 265):

> In most areas dealers and dealer-type markets are faced with severe competition. Livestock dealers in the North Central region had an average of 12 other marketing agencies competing with them in their trade area for livestock. These included an average of three auctions, one local market, six other dealers, one direct packer buyer, and one terminal.

The serious nature of false weighing in the livestock industry, which is identical in nature to padding weight by pencil, is set forth at length in *In re Muehlenthaler*, 37 Agric. Dec. 313, 331–32, 353–69, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978). In *Muehlenthaler*, it is explained that during the 25 years from 1950–January 1974, there were 162 cases under the Packers and Stockyards Act in which registrants were found in a formal proceeding to have falsely weighed livestock or caused someone to falsely weigh livestock. Suspension orders were issued in 160 of the 162 cases. The average suspension period in those 160 cases was 245 days, or 8 months (37 Agric. Dec. at 331).[198]

Respondent's attorney concedes that if respondent arbitrarily added weight by pencil, "the Complainant has a case in which a five or six month suspension might be appropriate because of fraud" (Appeal to Judicial Officer at 1).[199]

In two similar cases involving pencil weight padding by dealers, the dealers' registrations were suspended for 2 years by the Hearing Examiner (now ALJ), but the 2-year suspensions were reduced to 6 months by the then Judicial Officer. *In re Fairbank*, 27 Agric. Dec. 1371, 1373, 1384 (1968), *aff'd*, 429 F.2d 264 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *In re Boone Livestock Co.*, 27 Agric. Dec. 475, 503–04 (1968). The Judicial Officer's sanction in the *Fairbank*

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[198] In *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 114–15 (8th Cir. 1972), *rev'd sub nom. Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187–88 (1973), the Court of Appeals reversed a 20-day suspension order issued in a false weighing case (because the violations were not "deliberate or flagrant" (454 F.2d at 115)), apparently thinking that there were only four prior Department precedents relating to false weighing. Actually, more severe sanctions, ranging up to 5 years, had previously been imposed in more than 100 false weighing cases. *In re Muehlenthaler, supra*, 37 Agric. Dec. at 356–57, 362–68. In any event, however, the Supreme Court reversed the Court of Appeals decision in *Glover*.

[199] His concession specifically applies "If the trucks did not stop at Pittsfield," which would merely be one way of proving that respondent arbitrarily added weight by pencil. Here the evidence proves conclusively that respondent arbitrarily added weight by pencil irrespective of whether the trucks stopped at Pittsfield.

case was expressly based on his reasoning in *Boone* (27 Agric. Dec. at 1384). In *Boone,* the Judicial Officer explained that future weight-padding cases may well result in more severe sanctions. Specifically, he stated (27 Agric. Dec. at 503):

> The complainant and the hearing examiner also recommended that respondent be suspended as a registrant under the act for a period of 2 years. In view of the number and *gravity* of the violations found, a substantial suspension of respondent as a registrant under the act is undoubtedly warranted. But, past suspensions imposed for similar kinds of violations, some of comparable flagrancy, have not been for as extensive a period as that recommended by the hearing examiner. Cf. *In re Harry Lee Sparks and Rex Wanda Sparks, supra.* We conclude that respondent should be suspended as a registrant under the act for a period of 6 months. In addition, we hereby give notice to the industry that in the future the flagrant disregard or breach of the standards of conduct imposed by the act in connection with the weight or weighing of livestock may well result in more severe sanctions in appropriate cases.

Accordingly, *Fairbank* and *Boone* cannot be relied upon for limiting the suspension period for similar weight-padding cases to 6 months—even with respect to suspensions to be issued by the person who was Judicial Officer at that time.

Moreover, since the present Judicial Officer was appointed in 1971, the sanctions imposed under all of the Department's regulatory programs have become much more severe. For example, the routine suspension period for failing to pay for livestock under the Packers and Stockyards Act was, until recently, 30 days. In *In re Mid-States Livestock, Inc.,* 37 Agric. Dec. 547, 549–52 (1977), *aff'd sub nom. Van Wyk* v. *Bergland,* 570 F.2d 701 (8th Cir. 1978), when a *respondent* appealed a 30-day suspension order for failure to pay for livestock to the Judicial Officer, the Judicial Officer *sua sponte* raised the issue as to whether the suspension order should be increased, and the Judicial Officer strongly recommended to complainant that it request a 5-year suspension order in the case. However, complainant recommended only a 60-day suspension order on appeal, which was adopted by the Judicial Officer (since it was then his policy never to increase the sanction recommended by the administrative officials (37 Agric. Dec. at 551)).[200]

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[200] That policy has since been repealed. *In re Rowland,* 40 Agric. Dec. 1934, 1952 (1981), *aff'd,* 713 F.2d 179 (6th Cir. 1983).

In a recent failure to pay case under the Packers and Stockyards Act, the present Administrator agreed with the Judicial Officer's recommendation in the *Mid-States* case, resulting in a suspension order of 5 years (*In re Powell*, 44 Agric. Dec. ___ (Mar. 7, 1985), *appeal denied*, 44 Agric. Dec. ___ (May 28, 1985) (appeal was not timely filed)), or a 60-fold increase over the 30-day suspension period previously imposed for such violations.

As stated above, the average suspension period in false weighing cases during a recent 25-year period was 8 months, which is the suspension period imposed here. There are, however, many cases in which lesser suspension periods were imposed (as well as many cases in which longer suspension periods were imposed). It is not possible to reconcile all of those cases. Where the issue is presented in future cases, I will attempt to achieve greater uniformity by increasing (rather than lowering) the suspension period.

The maximum suspension period that has been imposed in a false weighing case is 5 years. That was in a consent proceeding. *In re Kennett-Murray Co.*, 16 Agric. Dec. 8, 9–11, (1957). I believe that respondent's weight-padding violations were sufficiently flagrant as to warrant the maximum suspension that can be imposed under the Act in a weight-padding case. Accordingly, if I had authority to alter the order previously issued in this proceeding, I would change the 8-month suspension order to 5 years.[201]

In false weighing or weight-padding cases, it is not practicable for the Department to expend the resources required to attempt to determine the total extent of a particular individual's violations. Accordingly, the sanction issued in such cases is not based upon the total number of proven violations but, rather, on the size and nature of the proven violations, and the degree to which the proof shows that the violations were deliberate and flagrant.

In addition, where serious and deliberate weighing violations can be proven without a doubt, it is not the policy of the agency to send a warning letter. *In re DuQuoin Packing Co.*, 41 Agric. Dec. 1367, 1381 n.2 (1982). Respondent's violations here were wilful, deliberate and flagrant, and, therefore, a warning letter would not have been appropriate.

In addition to respondent's weight-padding and commission-overcharge violations, respondent also created false records, in violation

[201] Respondent is fortunate that I did not have the time when I issued the original order in this proceeding to write the present decision. Since complainant only requested a 9-month suspension order (and I dismissed the insurance charge, resulting in a reduction of the suspension order to 8 months), I did not take the time to document the violations in the manner that would have been required to support a 5-year suspension order, increased to that length *sua sponte* by the Judicial Officer.

of the Act and regulations (7 U.S.C. § 221; 9 CFR §§ 201.44, .46, .49). The serious nature of recordkeeping violations is set forth in § VII(C)(3), *supra*.

In every case of false weighing or weight padding, false records are necessarily created, and, therefore, the sanction imposed for false weighing or weight padding is generally not increased because of the additional false record violations. Here, however, respondent's worksheets are of a nature to warrant an independent sanction. That is, the fabrication of worksheets falsely explaining invoice weights is not an integral part of weight-padding violations. In fact, in my 35 years with the Department, I have never seen any worksheets similar to those fabricated by respondent here.

Even though respondent's worksheets were not furnished to complainant's investigators, and, therefore, did not mislead the investigators, the worksheets were introduced in evidence, making respondent's violations much more difficult to prove. Such a flagrant creation of false documents would, independently of the weight-padding violations, warrant a 5-year suspension order.

The usual types of false records generated in weight-padding cases are relatively easy to detect and disprove. For example, where a dealer generates false invoices allegedly issued by an auction market or another dealer, or alters the figures on invoices issued by an auction market or another dealer, it is relatively easy to detect and prove violations by going to the original records of the other party.

But where, as here, false worksheets are fabricated, it is extremely difficult to detect and prove the violations. (In fact, I infer that the 14 violations proven here are merely the tip of the iceberg, but no part of the sanction in this case is based on this inference.)[202] Accordingly, the sanction in this case should be sufficiently severe to discourage any future potential violator from even thinking of creating false worksheets to support weight-padding violations.

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[202] I base this inference (i) on the difficulty of proving violations, (ii) on the fact that the proven violations relate to 11 different customers, and (iii) on the fact that the proven violations occurred so close together, *e.g.*, on September 14 and 15, two on September 29, two on October 13, and on Tuesday, November 28 and Saturday, December 2. In addition, on three occasions, respondent's purchases from a single source resulted in two *proven* violations, *i.e.*, his purchase through Ed Van Ee at Springfield, Missouri, on September 13, 1978, resulted in Transactions 2 and 6; his purchase at Kansas City, Missouri, on September 28, 1978, resulted in Transactions 3 and 7; and his purchase at Kansas City, Missouri, on October 12, 1978, resulted in Transactions 8 and 9.

The Act authorizes the Secretary to suspend a registrant "for a reasonable specified period" (7 U.S.C. § 204). There is no specific limit imposed as to the suspension period as there is in the case of other statutes (*e.g.*, the Perishable Agricultural Commodities Act limits suspension orders to 90 days, 7 U.S.C. § 499h(a)). Where Congress has not imposed any maximum limit on the suspension period, no limit should be imposed by interpretation, as long as the suspension period is reasonable. I believe that a 5-year suspension order is reasonable for a person such as respondent, who regularly and repeatedly used his pocket calculator to steal various amounts ranging from $147.73 to $1,814.35 from customers, and generated false scale tickets and worksheets to cover up his fraud.

The fact that respondent's customers were satisfied in these transactions is irrelevant in determining the sanction to be imposed in this case. Respondent's customers were deceived. They were totally unaware of the fact that respondent was using his pocket calculator to bill them for "phantom weight."

But even if respondent's customers had remained satisfied if they had known all of the relevant facts, it is well settled under this Department's sanction policy that the sanction would not be reduced for that reason. See *In re Steinberg Bros. Co.*, 43 Agric. Dec. ——— (Dec. 26, 1984); *In re Bosma*, 41 Agric. Dec. 1742, 1754 (1982) (satisfaction of farmers for whom auction market sold livestock did not negate a violation of Packers and Stockyards Act and regulations by auction market), *aff'd in part and rev'd in part on other grounds*, 754 F.2d 804 (9th Cir. 1984); *In re Louvier*, 19 Agric. Dec. 1427, 1439 (1960) ("It is not a defense to these violations to say that respondent's principals or customers are satisfied with his services. The test is whether respondent [a livestock order buyer] complied with the act . . .").

In fact, even where customers of a violator urge the Department to impose a lenient sanction on the violator (so that the violator will be able to meet his obligations to them), their requests are ignored. *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. ——— (Jan. 27, 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. ——— (Aug. 31, 1983); *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426–27 (1983) (order denying intervention), *final decision*, 42 Agric. Dec. (Mar. 25, 1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441–42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34–35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

Whether an 8-month suspension order will affect respondent's ability to continue in business as a livestock dealer is irrelevant in

this proceeding. In the case of civil penalties imposed under the Act, the statute requires that ability to continue in business be considered (7 U.S.C. § 213(b)) (see § XIX(C), *infra*). However, no such requirement is imposed by Congress with respect to suspension orders (7 U.S.C. § 204). When a provision is carefully included in one section of a statute, and omitted in another section, it should not be implied in the place at which it is omitted. *Lang* v. *Comm'r of Internal Revenue,* 289 U.S. 109, 112 (1933); *Corn Prods. Ref. Co.* v. *Benson,* 232 F.2d 554, 562 (2d Cir. 1956).

In addition, respondent is ideally situated to withstand a lengthy suspension order. Respondent can utilize his facilities for becoming a livestock feeder during any suspension period. Respondent owns about 40 acres, with a barn and cattle feeding pens (Tr. 265, 294-95). While respondent is suspended as a registrant, he will be able to buy and sell livestock for his own feeding operation. That is, a person who merely buys and sells livestock for his own feeding operation is not "engaged in the business" of buying or selling livestock (7 U.S.C. § 201(c)-(d)).

Finally, it is appropriate to state, once again, that I would impose the same suspension order in this case even if a reviewing court were to disagree with 95% of the reasons set forth above. That is, I have included every relevant circumstance upon which I rely to support the order solely because this decision is written in response to the court's remand order. The order imposed here would be fully justified by only a small fraction of the violations, evidence, and circumstances outlined in this decision.

B. USDA's Sanction Policy.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since 1971 or 1972.

The basis for the Department's sanction policy is set forth at great length in numerous decisions, e.g., *In re Worsley,* 33 Agric. Dec. 1547, 1556-71 (1974).[203] The Department's sanction policy is also discussed at length in *In re Esposito,* 38 Agric. Dec. 613, 624-65 (1979).

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[203] The Department's severe sanction policy did not originate with *Worsley,* but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner,* 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller,* 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam,* 498 F.2d 1088 (5th Cir. 1974).

The imposition of a severe administrative sanction is never a pleasant task. A license suspension or revocation order prevents a person from engaging in his chosen business for a specified period, or permanently. This can cause great hardship, not only to the individual violator, but to his family, employees, and customers.

It is much easier and more pleasant to be "charitable" to the violator, putting more emphasis on his needs than the needs of society. The noted German philosopher Nietzsche observed a century ago:

> There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous*? Why still punish? Punishing itself is terrible." [204]

Similarly, in administering regulatory programs, there is a danger that the agency may become so "pathologically soft and tender" that it fails to achieve the purpose of the legislators who enacted the remedial statutes.

Since the Department of Agriculture administers approximately 50 regulatory statutes—more than any other agency—it is important that the Department administer the statutes in a manner to achieve the Congressional purposes.

The sanction policy that has been followed in the Department's administrative disciplinary proceedings since 1971 or 1972 is set forth below. Most of this language is taken verbatim from prior decisions. See, *e.g.*, *In re Worsley*, 33 Agric. Dec. 1547, 1556–71 (1974).

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting a person to engage in a Federally regulated business, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." [205]

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[204] Nietzsche, *Beyond Good and Evil* § 201, at 114 (1886; Kaufmann Trans., 1966).

[205] *Nichols & Co.* v. *Secretary of Agriculture*, 131 F.2d 651, 659 (1st Cir. 1942). *Accord Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938); *Kent* v. *Hardin*, 425 F.2d 1346, 1349 (5th Cir. 1970); *Blaise D'Antoni & Associates, Inc.* v. *SEC*, 289 F.2d 276, 277 (5th Cir.), *cert. denied*, 368 U.S. 899 (1961); *Eastern Produce Co.* v. *Benson*, 278 F.2d 606,

Continued

An administrative agency has the power to "impose a suspension as a 'sanction' against specific conduct or because of its 'deterrence' value—either to the subject offender or to others similarly situated." [206] The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies,* 42 Mich. L. Rev. 51, 85 (1943)). Accordingly, since 1971 or 1972 the Department has followed the policy of imposing severe sanctions for serious or repeated violations to serve as a deterrent not only to the respondent, but also to other potential violators.

Socrates recognized that "the proper office of punishment is twofold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better." [207]

Similarly, Plato said that no man is to be punished "because he did wrong, for that which is done can never be undone, but in order that, in the future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing." [208]

The deterrent effect of punishment of one violator on potential violators is recognized in Deuteronomy 13:10-11 (R.S.V.; see also, Deuteronomy 19:19-20), as follows:

> You shall stone him to death with stones. . . . And all Israel shall hear, and fear, and never again do any such wickedness as this among you.

The purpose of sanctions imposed by the Department is, in this respect, the same as one of the purposes of criminal penalties. In the field of criminal law, one of the primary purposes of the penal-

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610 (3d Cir. 1960); *Cella* v. *United States,* 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied,* 347 U.S. 1016 (1954); *Irving Weis & Co.* v. *Brannan,* 171 F.2d 232, 235 (2d Cir. 1948); *Nelson* v. *Secretary of Agriculture,* 133 F.2d 453, 456 (7th Cir. 1943); *Board of Trade of City of Chicago* v. *Wallace,* 67 F.2d 402, 407 (7th Cir.), *cert. denied,* 291 U.S. 680 (1933); *Farmers' Livestock Comm'n Co.* v. *United States,* 54 F.2d 375, 378 (E.D. Ill. 1931). See, also, *Steuart & Bros.* v. *Bowles,* 322 U.S. 398, 406-07 (1943); *Hawker* v. *New York,* 170 U.S. 189, 189-200 (1898); *Ex Parte Wall,* 107 U.S. 265, 287-90 (1882); *Brown* v. *Wilemon,* 139 F.2d 730, 731-32 (5th Cir. 1944); Chamberlain, Dowling, and

ty imposed on a particular violator is to deter other potential violators.

> [P]unishment, in this context [*i.e.*, "general prevention"], is used not to prevent future violations on the part of the criminal, but in order to instill lawful behavior in others.[209]
>
> ["Deterrence"] is aimed at the protection of society. By making a certain action a punishable offense, we expect that people will refrain from committing the offense through fear of punishment. . . .
>
> The purpose of punishment as a deterrent . . . is also to demonstrate to the potential offender the consequences if he violates the law.[210]
>
> [T]he deterrent value of a correctional system is not restricted to those who come into direct contact with it but applies to the whole population.[211]
>
> [I]t is a primarily preventive consideration—having an eye to what is necessary to keep the people reasonably law-abiding—which today's legislators have in mind, too, when they define crimes and stipulate punishments.[212]
>
> [P]olice regulations which are such commonplaces in modern times: traffic ordinances, building codes, . . . regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals.[213]
>
> The purpose of punishment, be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to impose a loss on the offender. Its object is to act as a deterrent: first to discourage the offender himself

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209 Andenaes, *The General Preventive Effects of Punishment*, 114 U. of Pa. L. Rev. 949, 982 (1966).

210 Gardiner, *The Purposes of Criminal Punishment*; 21 Mod. L. Rev. 117, 121 (1958).

211 Gould and Namenwirth, *Contrary Objectives: Crime Control and the Rehabilitation of Criminals*, in Douglas, Crime and Justice in American Society 237, 246 (1971).

212 Andenaes, *General Prevention—Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 177 (1952-53).

213 *Id.* at 182.

from repeating his transgression; and, second, to deter others from doing likewise.[214]

["Sentencing is"] an exacting task in which the Court undertakes to . . . impose a sentence which will best protect society, deter others and punish . . . the offenders.[215]

More controversial but certainly no less important [than deterrence of the individual violator] is the need for *deterrence,* "general prevention," of potential criminals who may be dissuaded from crime by the threat and the administration of penalties.[216]

Penalties are not provided as punishment for the individual who has gone wrong. Their imposition is alone justified for the effect the punishment may have upon the convict in preventing him from continuance in crime and in teaching him that "the way of the transgressor is hard." But the still greater effect to be attained is the deterrent effect the sentence may have upon those who may be inclined to follow the criminal course upon which the convict has embarked.[217]

[D]eterrence looks primarily at the potential criminal outside the dock [of the courtroom]. . . .[218]

Punishment can protect society by deterring potential offenders. . . .[219]

[T]he greater the penalty, the "higher the costs associated with criminal activity," and the higher these costs, the fewer crimes committed.[220]

One of these goals [of law] is deterrence by means of punishment. We punish in order to deter people from engaging in the undesirable conduct which we call a crime. . . . [D]eterrence, addresses itself, . . . both to the individual himself—we hope he will be deterred in the future—and to the entire community.[221]

[illegible] 001 (D.D.C. 1967).
[illegible] pp. 1, 4 (D.N.H. 1965).
[illegible] 43 (1960).
[illegible] *wasky,* 219 App. Div. 19, 24-25; 219 [illegible] 737 (1927).
[illegible] Fitzgerald, *Salmond on Jurisprudence* § 15, at 94 (12th ed. 1966).
[219] *Ibid.*
[220] Berns, *Justified Anger: Just Retribution,* 3 Imprimis 3 (June 1974).
[221] Puttkammer, *Administration of Criminal Law* 8 (1953).

Perhaps the most salient authority for the proposition that one of the primary ends of punishment is to serve as a deterrent to other potential violators is Chief Justice William Howard Taft's statement written in 1928:

> [T]he chief purpose of the prosecution of crime is to punish the criminal and to deter others tempted to do the same thing from doing it because of the penal consequences.[222]

Johannes Andenaes, a leading authority from the University of Oslo, makes the same point, as follows: "From the point of view of sheer logic one must say that general prevention—*i.e.*, assurance that a minimum number of crimes will be committed—must have priority over special prevention—*i.e.*, impeding a particular criminal from future offenses." [223]

In other words, it is more important to the general welfare of society to consider the effect that a sanction will have on other potential violators than to consider the sanction needed to prevent the particular individual from again violating the law. In fact, it is not uncommon to have certain types of offenses committed where "there will practically never be an individual preventive need for punishment" and yet punishment "is necessary for general prevention." [224]

Whether punishment achieves the objective of deterring others from violating the law is questioned by some authorities,[225] but affirmed by many others.

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[222] Menninger, *The Crime of Punishment* 194 (1968). The original statement of Chief Justice Taft's position appeared in his article, *Toward a Reform of the Criminal Law*, in The Drift of Civilization (1929).

[223] Andenaes, *The General Preventive Effects of Punishment*, 114 U. of Pa. L. Rev. 949, 952 (1966).

[224] Andenaes, *General Prevention—Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 196 (1952-53).

[225] See, *e.g.*, Menninger, *The Crime of Punishment* at viii, 9, 108, 113, 206-08 (1968). However, even though Menninger believes that our present system of punishing criminals is a "crime" (*id.* at 28, 86, 280), he favors "penalties" for violators. He states (*id.* at 202-03):

> Certainly the abolition of punishment does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming. I favor stricter penalties for many offenses, and more swift and certain assessment of them.

Continued

As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalties does prevent crime. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively plied their trade in the shadow of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.

Persons with a will to believe in the efficacy of an exclusively individualistic and positivistic correctional system often quote the words of Warden Kirchwey. His patent oversimplifications of man's behavioral motivations should be noted, for this sort of loose thinking and naive criminological idealism pervert the ends of correction. (Footnote omitted).

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It is true, certainly, that the Classical doctrine of deterrence appears crudely oversimple in the light of modern conceptions of human behavior. In terms of reasonable goals for today it proposed to accomplish both too much and too little. This doctrine of deterrence was substantially more sound, however, than the position taken by those who deny any preventive effect to criminal sanctions. It is

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But these are not *punishments* in the sense of long-continued torture—pain inflicted over years for the sake of inflicting pain. If I drive through a red light, I will be and should be penalized.

If we disregard traffic signals we are penalized, not punished. If our offense was a calculated "necessity" in an emergency, then the fine is the "price" of the exception.

All legal sanctions involve penalties for infraction. But the element of punishment is an adventitious and indefensible *additional* penalty; it corrupts the legal principle of *quid pro quo* with a "moral" surcharge. Punishment is in part an attitude, a philosophy. It is the deliberate infliction of pain in addition to or in lieu of penalty. It is the prolonged and excessive infliction of penalty, or penalty out of all proportion to the offense.

maintained here that the penal law and its application do in fact deter; indeed, with the declining efficacy of other forms of social control, it must be relied upon increasingly to maintain standards of behavior that are essential to the survival and security of the community. A complete failure of legal prevention cannot be inferred from the serious crimes committed by a small per cent of the population any more than can its success by the law obedience of the great preponderance of men. (Footnote omitted). The matter is not so simple.[226]

[As to studies] indicating that the death penalty is ineffective as a deterrent to murder, their very broad interpretation has rendered a disservice to the more general issue of punishment as a deterrent to all kinds of criminal behavior. Such an expansive conclusion is obviously not justified since murder is, in many ways, a unique kind of offense often involving very strong emotions.[227]

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. . . It is naive to suppose that punishment exists in a vacuum and is unrelated to the specific kinds of acts and the meaning which the punishment has for the actor.[228]

That sanctions do, in fact, serve as a deterrent to "white-collar" violations is evidenced by a number of studies.

As Sutherland's analysis of white-collar crime has shown, violators of the Sherman Antitrust law are relatively free from criminal prosecution, though the imposition of punishment would be *maximally effective* with this type of offense.[229]

An intensive study of parking violators indicates that . . . an increase in the severity and certainty of punishment does act as a deterrent to further violation. These findings suggest the necessity for a reappraisal of current thinking. Studies demonstrating the ineffectuality of punishment as a deterrent to certain types of offenses should

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226 Tappan, *Crime, Justice and Correction* 245-46 (1960).

227 Chambliss, *The Deterrent Influence of Punishment*, 12 Crime & Delinq. 70, 71 (Jan. 1966).

228 *Id.* at 75.

229 Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 Wis. L. Rev. 703, 716 (emphasis supplied).

not be interpreted to mean that punishment is ineffective in deterring all types of offenses.[230]

Since one of the main purposes of a criminal law sentence is to deter other potential violators from committing similar violations, it follows, *a fortiori*, that one of the main purposes of an administrative law sanction is to deter other potential violators.

In criminal law, "[r]etribution or social retaliation, though persistently criticized by modern advocates of a progressive penology, continues to be a major ingredient of our penal law and of our correctional system." [231] "The principle of retribution was formulated in the *lex talionis*, the Mosaic doctrine expressed in *Deuteronomy*, 19:21: 'Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.' " [232]

But retribution or social retaliation is not one of the objectives of administrative sanctions—they are to "assure a proper adherence to the provisions of the Act" (*Nichols & Co.* v. *Secretary of Agriculture, supra*). Deterrence—both as to the individual violator, and as to other potential violators—is the objective of an administrative sanction.

To serve as an effective deterrent to potential violators of a regulatory statute, administrative sanctions must be severe; sanctions which are too lenient, rather than being a deterrent, will serve as a catalyst for violations by others. Not all criminologists, sociologists, or jurists share this view; but many noted authorities do.

> Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act. . . .[233]

> . . . [W]hen penalties for criminal activity that many people find attractive are quite low, thereby making crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through criminal means. . . .[234]
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> . . . [I]f potential offenders believe that their chances of apprehension cannot be dismissed, the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty. . . .[235]
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> * * * * * * *
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> . . . [I]t is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base penalty.[236]
>
> If we are hopeful of the curative effects of a threat, we have to make the threat unpleasant, which is another way of saying that we have to be severe.[237]

Dr. Zimring, a noted authority, capsulizes this concept in answering the question, "how can the legal system make the best use of variations in severity [of sanctions] to achieve social defense?" by stating:

> One answer is that, since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and noncriminal behavior by threatening all types of serious crime with penalties which are as severe as possible. The aim of this strategy is to create a walled fortress around criminal activity by using the full

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234 *Id.* at 84.
235 *Id.* at 85.
236 *Id.* at 89.
237 Puttkammer, *Administration of Criminal Law* 16-17 (1953).

> power of threatened consequences to keep potential criminals from becoming actual criminals.
>
> Another possible strategy would be to threaten all serious crimes with major penalties, but to save a considerable amount of variation in threatened penalties to underscore distinctions between *types of crime,* as well as between serious crime and law-abiding behavior.[238]

Johannes Andenaes, of the University of Olso, regarded by many as one of the most distinguished of the modern scholars writing about deterrence, states that "The simplest way to make people more law-abiding, therefore, is to increase the punishment." [239] Mr. Andenaes believes that "Feuerbach's formula of psychological coercion: the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime" has a "certain validity" as to violators of "economic regulations." [240] *"[E]conomic crimes,"* to utilize his epithet, are clearly within the purview of the foregoing severity doctrine, such crimes being violations of "governmental regulation of the economy: price violations, rationing violations, unlawful foreign exchange transactions, offenses against workers protection, disregard of quality standards, and so on." [241]

The applicability of severe sanctions to deter violations of "regulations governing commerce" and other "economic" regulations is succinctly treated by Andenaes:

> I shall begin with a group of crimes which play a modest role in the literature but which have a good deal of practical importance and are good for illustration, all these *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, laws governing the sale of alcoholic beverages, regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals. A public-spirited citizen has, of course, certain inhibitions against breaking laws and regulations. But experience shows that moral

> and social inhibitions against breaking the law are not enough in themselves to insure obedience, where there is conflict with one's private interests. Thus the extent to which there can be effective enforcement by means of punishment determines to what extent the rules are actually going to be observed. . . .[242]
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> * * * * * * *
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> . . . A large number of the people who are affected by economic regulations . . . feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies. . . . Yet the matter of obedience or disobedience can often have important economic consequences. . . . In this area, at any rate, Feuerbach's law of general prevention has a certain validity: it is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law.[243]

Andenaes is careful to note that severity of punishment has a more salient effect on crimes, like economic violations, "committed after careful consideration . . . than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion)." [244]

Isaac Ehrlich, in one of the most sophisticated analyses of criminal activity ever made, using a simultaneous equation model for a regression analysis involving fourteen variables, found that the "rate of specific crime categories, with virtually no exception, varies inversely with estimates of the probability of apprehension and punishment by imprisonment . . . and with the average length of time served in state prisons. . . ." [245]

Similarly, Professor Gordon Tullock states that "multiple regression studies show that increasing the frequency *or severity* of the punishment does reduce the likelihood that a given crime will be committed." [246] Professor Tullock concludes: "We have an unpleas-

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[242] *Id.* at 182.

[243] *Id.* at 185.

[244] *Id.* at 192.

[245] Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. of Pol. Econ. 545 (May-June 1973).

[246] Tullock, *Does Punishment Deter Crime?*, 36 The Pub. Interest 103, 109 (1974) (emphasis supplied).

ant method—deterrence—that works, and a pleasant method—rehabilitation—that (at least so far) never has worked." [247]

My views with respect to the necessity for severe sanctions for serious violations, in order to achieve the Congressional purpose of the Department's regulatory programs, were set forth in *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850-51 (1972) (ruling on reconsideration), as follows:

> Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.
>
> Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

It is the general administrative practice under the Department's regulatory programs to institute formal actions only as to violations regarded as serious or repeated. Many minor violations are disposed of with a warning letter or an informal stipulation. Hence it is to be expected that the relatively few formal cases which are instituted will generally warrant relatively severe sanctions.

To summarize, a strong argument can be made in support of any philosophy of punishment or sanctions, ranging from extremely light to very severe. There are many excellent judges, criminologists, and sociologists at either end of the poles of this issue; many others take a position between the poles. For the reasons set forth above, where the violation is serious or repeated, this Department imposes severe sanctions to deter future violations by the respondent and others.

to exist.[248] In other words, the more serious the violation, the more severe should be the sanction. Even though punishment for the sake of punishment is not a relevant consideration in the field of administrative law, the principle of having a reasonable relationship between the violation and the sanction still has validity in a case of this nature. This is because in order to achieve the major Congressional purposes of the regulatory program it is more important to deter serious violations than minor violations. Hence a severe sanction for a serious violation will have a greater deterrent effect than a milder sanction for a lesser violation, and thus will tend to effectuate the major objectives of the regulatory program.

In determining sanctions to be imposed by the Department, great weight is given to the recommendation of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 845–46 (1972) (ruling on reconsideration). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, *e.g.*, *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendaton of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators is given great weight.

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[248] *Kent* v. *Hardin*, 425 F.2d 1346, 1349–50 (5th Cir. 1970); *G.H. Miller & Co.* v. *United States*, 260 F.2d 286, 295–97 (7th Cir. 1958) (*en banc*), *cert. denied*, 359 U.S. 907 (1959); *Daniels* v. *United States*, 242 F.2d 39, 42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *Irving Weis & Co.* v. *Brannan*, 171 F.2d 232, 235 (2d Cir. 1948); *In re Romoff*, 31 Agric. Dec. 158, 177 (1972); *In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1596 (1971). See, also, *American Power Co.* v. *SEC*, 329 U.S. 90, 112–18 (1946); *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 194 (1941); *Great Western Food Distrib., Inc.* v. *Brannan*, 201 F.2d 476, 484 (7th Cir.), *cert. denied*, 345 U.S. 997 (1953); *In re Electric Power & Light Corp.*, 176 F.2d 687, 692 (2d Cir. 1949); *Wright* v. *SEC*, 112 F.2d 89, 95 (2d Cir. 1940).

Insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform.[249] From the beginning, the Judicial Officer has recognized that "[d]isciplinary action taken under [a regulatory] act should follow some general pattern, . . . so that one order will not be entirely out of line with another involving similar violations." [250] Accordingly, counsel should, in all cases, in their briefs and arguments, refer to *relevant* prior cases under the Act which should be considered in determining the appropriate sanction to be imposed in the particular case, in the event a violation is found to have occurred.

In determining whether one case is comparable to another, all of the relevant facts and circumstances must be considered, such as the nature of the violations, the nature of the respondents' businesses, the respondents' prior record as to violations, the deliberateness of the violations, prior warnings given to the respondents, etc.

Also, the goal of uniform sanctions for comparable violations necessarily applies only to contested cases. Consent orders issued without a hearing are given no weight in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not revealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem

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[249] Inequality in judicial sentencing occurs "every day, often in different courtrooms in the same courthouse. Two boys fail to report for military induction—one is sentenced to five years in prison, the other gets probation and never enters a prison. One judge sentences a robber convicted for the third time to one year in prison, while another judge on the same bench gives a first offender ten years. One man far more capable of serious crime than another and convicted of the same offense may get a fine, while the less fortunate and less dangerous person is sentenced to five years in the state penitentiary." Clark, *Crime in America* 224 (1970). There is no excuse for such erratic sanctions in administrative disciplinary proceedings before a single agency.

more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller* v. *SEC*, 429 F.2d 856, 858-59 (2d Cir. 1970); *G.H. Miller & Co.* v. *United States*, 260 F.2d 286, 296 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959). As the Court held in *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-87 (1973):

> We read the Court of Appeals' opinion to suggest that the sanction was "unwarranted in law" because "uniformity of sanctions for similar violations" is somehow mandated by the Act. We search in vain for that requirement in the statute. . . . The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.

An agency is free to reconsider sanctions previously imposed without prior notice. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946); *Continental Broadcasting, Inc.* v. *FCC*, 439 F.2d 580, 582-84 (D.C. Cir. 1971); *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (quoted with approval in Davis, *Administrative Law Treatise* § 17.08, at 604 (1970 Supp.)). In *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946), the Court held:

> Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severely as in this case. . . . The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

As I stated in *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850 (1972) (ruling on reconsideration):

> In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

To conclude this extended discussion as to the Department's sanction policy, Congress has determined that there is a need for Federal regulation of the agricultural marketing system. To achieve the Congressional purposes with respect to the various remedial statutes administered by the Department, severe sanctions must be imposed for serious violations. We have no reasonable alternative. "For whatever our opinion may be on the question of free versus controlled economy, there is no denying that ineffective regulation is the worst arrangement of them all." [251]

C. The $10,000 Civil Penalty Imposed in This Case Is Much Too Lenient.

The Act authorizes a civil penalty of not more than $10,000 for each violation. The Act provides (7 U.S.C. § 213(b)):

> (b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or

[251] Andenaes, *General Prevention—Illusion or Reality?*, 43 The J. of Crim. L., Criminology and Police Sci. 176, 184 (1952-53).

> will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.

In three of the transactions involved here, respondent was in a fiduciary relationship with his customers (Transactions 3, 4 and 5). He violated his trust by padding the weight and, in two of the transactions (Transactions 3 and 5), by charging more than the agreed-upon commission. The three breacn-of-trust violations each warrant a $10,000 civil penalty.

In addition, the other 11 weight-padding violations each warrant a civil penalty of at least $5,000. If those civil penalties had been imposed, the total civil penalty would have been $85,000. (I doubt whether an $85,000 civil penalty would have removed the profit from respondent's weight padding during 1978 (see note 202 and accompanying text)).

The statute requires the Secretary to consider three factors in determining the amount of a civil penalty under the Act. As to the "gravity of the offense," as shown above, respondent's violations were extremely flagrant.

As to the "size of the business involved," the record here shows that respondent is a very large dealer, buying as much as $289,986.58 worth of livestock in a single day. The following table lists the livestock purchases by respondent revealed by this record, which shows only a small fraction of respondent's total purchases in 1978.

Respondent's Livestock Purchases Revealed by Record

Date of Purchase	Amount of Purchase	Record Reference
Aug. 11, 1978	$155,086.54	CX 1, p. 7
Sept. 1, 1978	198,692.40	CX 5, p. 7
Sept. 13, 1978	85,102.61	CX 2, p. 5; CX 6, p. 5
Sept. 28, 1978	137,674.60	CX 3, p. 5; CX 7, p. 6
Oct. 5, 1978	248,856.33	CX 4, p. 5
Oct. 12, 1978	289,986.58	CX 8, pp. 3, 4; CX 9, pp. 5, 6
Oct. 13, 1978	55,845.93	CX 8, p. 6
Oct. 26, 1978	137,257.51	CX 10, p. 6
Nov. 4, 1978	30,684.27	CX 12, p. 8
Nov. 16, 1978	135,591.13	CX 11, pp. 5-6

Respondent's Livestock Purchases Revealed by Record—Continued

Date of Purchase	Amount of Purchase	Record Reference
Nov. 27, 1978	66,484.24	CX 13, p. 9
Nov. 27, 1978	5,153.64	CX 13, p. 13
Dec. 1, 1978	74,216.88	CX 14, pp. 6-19

Based on the evidence in this record as to respondent's large-scale purchases of livestock, and his operation of a large feed yard at Pittsfield, consisting of about 40 acres, with covered and uncovered livestock pens, I infer that a modest, $10,000 civil penalty would have no effect whatever on respondent's ability to continue in business.

In addition, official notice is taken of the Annual Reports filed by respondent with the Packers and Stockyards Administration on April 15, 1982, April 15, 1983, April 14, 1984, and February 15, 1985.[252] These Annual Reports also support the inference that a $10,000 civil penalty would have no effect on responddent's ability to continue in business.

Respondent's Annual Report filed April 15, 1982, which is the Annual Report most relevant to the original Decision and Order issued in this case on August 31, 1982, lists total assets of $854,959 and total liabilities of only $120,697. Respondent's current assets included $231,528 cash, $173,653 livestock, $29,340 accounts receivable, and $123,000 cash value of insurance policies. Respondent included other assets of $102,500 land, $376,186 buildings, structures and equipment, less $180,978 allowance for depreciation, or total other assets of $297,708.

Respondent's Annual Report filed in 1982 showed, however, that respondent had a net loss of $52,567 from his livestock operations for 1981.

Respondent's Annual Report filed April 15, 1983, shows an increase in total assets of $216,427, *i.e.*, total assets of $1,071,386 (notwithstanding a reported net loss for 1982 of $335). This included $260,000 cash, $139,880 livestock, $150,798 accounts receivable, and $223,000 cash value of insurance policies, for total current assets of $773,678. Respondent listed his land at the same figure for the year before, $102,500, and his buildings, structures and equipment at

[252] Respondent was given 15 days within which to "show the contrary" (5 U.S.C. § 556(3)).

$326,186, less $130,978 allowance for depreciation. Respondent's total liabilities were listed as $129,249.

Respondent's Annual Report filed April 14, 1984, shows a dramatic change from the prior year. His total assets of $1,071,386 were reduced to $62,500, consisting of only $15,000 cash, $20,500 insurance policies, and $27,000 other assets. He lists no liabilities. For the third year in a row, respondent showed a net loss from his livestock operations, $31,453 for 1983.

Respondent's latest Annual Report, filed February 15, 1985, shows total assets of $102,150, consisting of $16,000 cash, $20,500 insurance policies, and $65,650 other assets. He lists no liabilities. For 1984, he shows a modest net profit, $16,264.[253]

Respondent raised no issue as to his ability to pay a $10,000 civil penalty at the original hearing before this Department, but on appeal he suggests reopening the proceeding "to consider the factors" stated in 7 U.S.C. § 213(b) (Appeal to Judicial Officer at 24).

The Department has always construed the Act as requiring a respondent to introduce evidence that a civil penalty would affect his ability to remain in business, if the respondent wished such factors considered. See, *e.g.*, *In re Trenton Livestock, Inc.*, 41 Agric. Dec. 1965, 1982 (1982); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980). However, in *Bosma* v. *USDA*, 754 F.2d 804 (9th Cir. 1984), the court held that the Department has the burden of producing evidence as to the size of the business involved and the effect of the penalty on the person's ability to continue to do business.

We believe that the *Bosma* decision is erroneous, in this respect, for the reasons set forth in the Department's petition for rehearing in *Bosma*, which is set forth as an appendix to this decision.

In addition, even if a $10,000 civil penalty would have an adverse effect on respondent's ability to continue in business, that would not be contrary to the statute, under the circumstances here. That is, the record in this case shows that respondent is corrupt in his livestock business activities. And when his fraudulent activities were detected, he fabricated records and offered perjured testimony in defense of his illegal conduct. Accordingly, it would be in the best interest of the livestock industry, and in the public interest, if respondent would choose another occupation, not subject to the ethical requirements of the Packers and Stockyards Act.

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[253] If a remand were necessary to consider respondent's ability to pay a $10,000 civil penalty, a probing inquiry into respondent's operations for the last few years would be appropriate, which could, conceivably, be more lengthy than the original hearing in this case.

The statute only requires that the Secretary "consider . . . the effect of the penalty on the person's ability to continue in business" (7 U.S.C. § 213(h)). It does not require that the Secretary refrain from imposing a civil penalty that would adversely affect the person's ability to continue in business where, as here, it is in the public interest that the respondent discontinue his livestock activities subject to the Act.

For the foregoing reasons, there is no evidentiary impediment to the $10,000 civil penalty imposed in this case.[254]

D. Affirmative Action Cease and Desist Orders Should Be Issued in Future Cases of This Nature.

In *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, No. 84-1053 (10th Cir. Aug. 13, 1985), the Department issued its first affirmative action cease and desist order under the Packers and Stockyards Act. The decision in *Peterman* states (slip op. at 38):

> In addition to a cease and desist order, affirmative action may be required by an agency order. *Encyclopedia Britannica, Inc.* v. *F.T.C.*, 605 F.2d 964, 970 n.2 (7th Cir. 1979); *Warner-Lambert Co.* v. *F.T.C.*, 562 F.2d 749, 756-757 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1977); *Waltham Watch Co.* v. *F.T.C.*, 318 F.2d 28, 32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963). An agency has such ancillary power even when Congress has only expressly authorized the issuance of cease and desist orders. *Warner-Lambert, supra; Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311-312, 312 n.17 (1963).

The cease and desist order in *Peterman, inter alia,* requires respondent to:

> (b) Prominently post a copy of the order issued in this proceeding in each such meat distribution business; [and]
>
> (c) Affirmatively advise each customer or prospective customer of such meat distribution business that the business is operating subject to the terms of this order. . . .

In similar cases of this nature, future cease and desist orders should require the respondent to post a copy of the order issued in the proceeding at his place of business and affirmatively advise

[254] In the event of a remand as to the civil penalty issue, unless the court directs otherwise, the suspension provisions of the order will not be stayed.

any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

APPENDIX

JACOB F. BOSMA, d/b/a CHINO LIVESTOCK COMMISSION COMPANY AND YARDAGE, Petitioner, *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. No. 83-7069.

Submitted by: *Richard Willard*, Acting Assistant Attorney General.
Leonard Schaitman and *Susan Sleater*, Attorneys, U.S. Department of Justice.
Raymond Fullerton, Assistant General Counsel, U.S. Department of Agriculture.
Virginia Strasser, Attorney, U.S. Department of Agriculture.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Introduction. Pursuant to Rules 35(b) and 40 of the Federal Rules of Appellate Procedure, the Department of Agriculture respectfully petitions the Court to rehear this case, and alternatively suggests that it be reheard en banc. Material considerations of law about the burden of proof were overlooked in the Court's decision.

The issue on which the Government seeks rehearing is whether section 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. 556(d), which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof," mandates that the agency introduce evidence concerning the size of the violator's business and the effect of the penalty on the violator's ability to continue in business when seeking a civil penalty under the Packers and Stockyards Act ("Packers Act"), 7 U.S.C. 181, *et seq.* This Court, in an opinion of July 25, 1984, ruled—without benefit of briefs by the parties on the issue—that, because the civil penalty provision of the Packers Act, 7 U.S.C. 213(b), provides that the Secretary shall consider size of and effect on the violator's business in determining the amount of civil penalty imposed, the APA requires that the agency assume the burden of going forward with proof on these considerations. The consistent procedure of the Secretary has been to place the burden of production on the sus-

pected violator, thus allowing it to choose whether to put size and effect on its continuation in business at issue. If no evidence is introduced the Secretary presumes the penalty should not be adjusted by these considerations.

It is important that the Court reconsider its ruling. Placing the burden on the agency of producing evidence about size of and effect on the violator's business—facts peculiarly within the violator's knowledge—will substantially delay imposition of civil penalties, hamper enforcement of the financial and trust fund provisions of the Packers Act by diverting the limited number of agency financial experts from these investigations, increase subpoena and similar litigation as suspected violators resist the agency's attempts to gather the necessary information about the suspects' financial affairs, and strain the limited financial resources of the agency. (See, *infra,* at 6.) Moreover, the considerations of size and effect are not unique to the Packers Act, but rather are standard considerations which Congress has enacted in numerous penalty statutes under various acts. The administrators of these acts also have routinely placed the burden of coming forward with proof on these considerations on the suspected violators. The court's broad APA ruling in this case will likely foment much litigation under these many other statutes, may be significantly disruptive to many important programs, and may allow violators to escape or delay penalties. (See, *infra,* at 7.) Moreover, placing the burden on the agency is unreasonably intrusive into the affairs of the suspected violators. The Court's decision means that Congress, by specifying these standard and innocuous penalty considerations, mandated that an agency scrutinize the tax returns and other financial records of private persons and businesses whenever it suspects them of violating totally unrelated statutes or regulations and seeks a civil penalty These serious, disruptive, intrusive and costly effects of allocating the burden of production to the agency strongly suggest that Congress could not have intended such a result. Indeed, the Court's ruling conflicts with a Seventh Circuit interpretation of identical language in another penalty statute, with this Court's allocation of burden of production in other cases, with the accepted interpretation of the APA, and with its plain meaning. The ruling also fails to give deference to the Secretary's consistent interpretation of the statute he is charged with administering. (See, *infra,* at 9.)

Since the issue was not briefed before the panel's decision, we respectfully urge the panel to reverse its ruling. However, because of the importance of the issue, if the panel is not inclined to grant rehearing, we respectfully suggest that *en banc* rehearing is appropriate.

STATEMENT

In this administrative review proceeding, the Department of Agriculture charged petitioner Bosma, a livestock market agent, with, *inter alia,* committing unfair and deceptive practices in violation of 7 U.S.C. 208(a), 213(a) and 221, in his reporting and accounting for livestock sales on which he realized a profit of $57,000.00. The agency sought a civil penalty of $15,000.00. After a hearing conducted on the record, an administrative law judge found Bosma's recordkeeping practices improper but not deceptive, and refused to assess any penalty. The agency appealed to the Secretary's designated Judicial Officer (J.O.) who found Bosma's practices deceptive and imposed a $10,000 civil penalty. The civil penalty statute, 7 U.S.C. 213(b), requires the Secretary to consider, when assessing a penalty, (1) the gravity of the offense, (2) the size of the business, and (3) the effect of the penalty on the violator's ability to continue to do business.[1] The J.O. found that Bosma had furnished no evidence on the second two factors which showed that the penalty was unreasonable. (Ct. App. Slip Opin. at 12.)[2]

After the J.O.'s decision, Bosma sought reopening and proffered a financial report to show the effect of the penalty on his ability to continue in business. The J.O. ruled reopening untimely and the financial report ambiguous in any event. (Under 7 CFR 1.147(a)(2),

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[1] Section 213 of the Packers and Stockyards Act, 7 U.S.C. 213, provides in pertinent part:

> (a) It shall be unlawful for any . . . market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with . . . , buying, or selling . . . or handling livestock.
>
> (b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subsection (a) of this section, the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. The Secretary may also assess a civil penalty of not more than $10,000 for each such violation. *In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business.* (Emphasis added.)

[2] Bosma did introduce some very limited testimony regarding his financial affairs at the hearing, and relied on that testimony in this Court to argue that the assessed penalty was too high. (See Bosma Opening Br. at 21). The J.O. considered, and this Court did not question, that the testimony furnished no evidence that the penalty should be reduced because of considerations of the size of the business or effect on continuing in business. (see USDA Br. at 22).

Similarly, the Court saw no difficulty with the J.O.'s assessment that Bosma's violations of the Packers Act were quite grave.

hamper enforcement of the financial and trust fund provisions, increase subpoena and similar litigation, and strain the limited financial resources of the agency.

Moreover, the requirement that the Secretary consider gravity, size and effect is a quite common provision for assessment of a penalty in a formal administrative adjudicative proceeding.[4] The agencies administering these cited statutes routinely place the burden of showing effect of the penalty on ability to continue to do business on the violator. Because this Court's decision is a broadly-worded interpretation of the APA, it can be expected to have some impact on assessment of penalties under similar statutes and could be quite disruptive. Even where similar penalty provisions under other statutes are distinguishable, the decision in this case is likely to foment litigation under these statutes. Moreover, by placing on the Department of Agriculture or any of the other agencies the burden of producing evidence regarding size and effect on continuing in business, a violator can avoid or delay assessment of a penalty simply by refusing to release the needed financial information. The violator alone is in control of the necessary financial information and it frequently may be difficult for the agency to obtain. Additionally, bearing such a burden of proof would be quite costly. Most agencies have limited expertise and resources to divert routinely to obtaining and analyzing financial data. Particularly since such analysis can be quite complicated and time-consuming and large numbers of penalties may be involved. (For example, over 12,000 penalties are assessed annually under the Federal Mine Safety and Health Act which requires identical consideration of gravity, size and effect in assessing a penalty, (30 U.S.C.

[4] For example, the Federal Mine Health and Safety Act penalty provision, 30 U.S.C. 815(b)(1)(B), includes gravity, size, effect, and three other considerations; the Child Labor provisions of the Fair Labor Standards Act, 29 U.S.C. 216e, include gravity and size; the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801, *et seq.*, by regulation includes consideration of ability to pay and explanations by the violators (48 Fed. Reg. 36736, Aug. 12, 1983); the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *l* (4), includes gravity, size and effect; the Toxic Substances Control Act, 15 U.S.C. 2615(a)(2)(B), includes gravity, effect and ability to pay; the Commodity Futures Exchange Act, 7 U.S.C. 9a, includes gravity, size and effect; the Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(6)(A), includes gravity, size and effect.

Other penalty provisions, which are adjudicated in *de novo* proceedings in the district court, require similar considerations. See, *e.g.*, 15 U.S.C. 45(m)(1)(C) which includes effect on business and ability to pay; 42 U.S.C. 7413(b) which includes seriousness, size, and economic impact on business; 33 U.S.C. 1321(b)(6)(B) which includes gravity, size and effect; and 47 U.S.C. 503(b)(2) which includes gravity and ability to pay.

815(b)(1)(B); presently about 1,000 formal hearings are conducted annually.)

Finally, placing the burden on the agency strongly intrudes upon the privacy of suspected violators. Indeed, it is highly unlikely that Congress, by specifying these relatively standard and innocuous penalty considerations, mandated that an agency scrutinize the tax returns and other financial records of private persons and businesses whenever it suspects them of violating totally unrelated statutes or regulations and seeks a penalty. It is much less intrusive to allow the violators themselves to choose to put financial status in issue.

These considerations make clear that rehearing en banc is warranted because the issue of burden of production is important to the government and to many unrepresented private parties. Moreover, the adverse effects themselves suggest that Congress did not intend such a result under the APA or the Packers Act.

II. THE COURT'S RULING IS CONTRARY TO THE ESTABLISHED INTERPRETATION OF THE APA AND ITS PLAIN MEANING, AND FAILS TO GIVE DEFERENCE TO THE SECRETARY'S CONSISTENT STATUTORY INTERPRETATION.

Section 7(c) of the APA, 5 U.S.C. 556(d), provides that: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." This provision refers to the burden of going forward with evidence rather than the burden of persuasion. *N.L.R.B.* v. *Transportation Management Corp.*, 103 S. Ct. 2469, 2475 n. 7 (1983).[5] This Court's allocation of the burden of going forward with evidence in this case conflicts with a Seventh Circuit interpretation of a similar penalty provision, with this Court's prior allocations of burden of production, and is contrary to the plain meaning of APA section 7(c), its legislative history and consistent interpreta-

[5] The burden of persuasion is not at issue in this case. If, as we urge above, the Secretary can rely on a presumption that size of and effect on the violator's business do not warrant reduction of the civil penalty, the agency has met any burden of persuasion it has. On the other hand, it is not uncommon for the ultimate burden of persuasion to lie on a party who opposes issuance of a proposed order. See, *e.g.*, *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975); *Schramm* v. *Physical Therapist Board*, 394 F.2d 972 (D.C. Cir. 1967), *cert. denied*, 340 U.S. 987 (1968).

Regarding consideration of gravity in determining the amount of the penalty, the Department of Agriculture accepts the burden of production and burden of persuasion to the limited extent that gravity is viewed as an evidentiary issue rather than a matter of judgment.

tion. The ruling also fails to give deference to the agency's interpretation of the statute it administers.

1. The purpose of APA section 7(c) is only to restate the traditional rule allocating the burden of proof. Atty Gen. Manual on the APA 75 (1947), quoting Sen. Comparative Print, June 1945 at 15; *Environmental Defense Fund* v. *EPA,* 548 F.2d 998, 1004 (D.C. Cir. 1976); *N.L.R.B.* v. *Mastro Plastics Corp.,* 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied,* 384 U.S. 972 (1966). The traditional rule is that the burden of going forward normally falls on the party having knowledge of the facts. *Environmental Defense Fund* v. *EPA,* 548 F.2d 998, 1004 (D.C. Cir. 1976); *N.L.R.B.* v. *Mastro Plastics Corp.,* 354 F.2d 170, 176 (2d Cir. 1965); *United States* v. *New York, N.H. & H.R.R.,* 355 U.S. 253, 256 n.5 (1957); *Nealey* v. Transportation Maritima Mexicana, S.A., 662 F.2d 1275, 1280-81 (9th Cir. 1980); 9 Wigmore, Evidence § 2846 at 275 (3d Ed. 1940). As this Court explained in *Nealey:*

> "the ordinary rule . . . , based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."

662 F.2d a 1280-81, quoting *Campbell* v. *United States,* 365 U.S. 85, 96 (1961). The facts concerning the size of and effect on the violator's business are "facts peculiarly within the knowledge of" the violator, such as Bosma. Moreover, the violator is in the best position to explain the information. In light of these considerations, the Second Circuit in *Mastro Plastics Corp.,* 354 F.2d at 176-77, ruled that under the APA, an employer who has been ordered to pay back wages by the N.L.R.B. is properly allocated the burden of producing evidence to show some necessary considerations, including whether the order would "work an undue economic hardship" or otherwise have an improper result. 354 F.2d at 176. This Court, without specifically mentioning the APA, follows this allocation of burden of proof in N.L.R.B. cases. See, *e.g., Alfred M. Lewis Inc.* v. *N.L.R.B.,* 681 F.2d 1154, 1156 (9th Cir. 1982); *M Restaurants, Inc.* v. *N.L.R.B.,* 621 F.2d 336, 337 (9th Cir. 1980).

Moreover, as the Attorney General's Manual states, *supra*, at 76, under APA section 7(c), an agency is permitted:

> to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.

Relying on this principle, the Seventh Circuit recently in *Sellersburg Stone Co.* v. *Federal Mine Safety & H. Rev. Com'n*, 736 F.2d 1147 (7th Cir. 1984), issued a decision which is in conflict with the instant decision. In *Sellersburg Stone Co.*, the court upheld a penalty assessed under the Federal Mine Safety and Health Act, 30 U.S.C. 820(i), which—like the Packers Act—requires the agency to consider "the effect [of the penalty] on the operator's ability to continue in business." Although the agency produced no evidence bearing on this factor, the court explained that "[i]n the absence of proof that the payment of civil penalties would adversely affect a company's ability to stay in business, it is presumed that there would be no such effect." 736 F.2d at 1153 n.14.

A presumption of size and ability to pay is particularly appropriate here. If the agency has the burden of producing financial and other information which the violator possesses, the violator could avoid or seriously delay imposition of a lawful penalty simply by refusing to furnish the information.

2. Section 7(c) allocates the burden of production to "the proponent of a rule or order." 5 U.S.C. 556(d). The violator is the "proponent" of a ruling decreasing a penalty. Since effect of the penalty on ability to continue to do business is clearly a factor relevant to decreasing the penalty, the violator should have the burden of producing evidence on this question. The legislative history of APA section 7(c) explains:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different rule, also for that purpose have a burden to maintain.

S.Doc. No. 248, 79th Cong. 2d Sess. 208, 270 (1946).

In the analogous case of *National Airlines, Inc.* v. *Civil Aeronautics Bd.*, 300 F.2d 711 (D.C. Cir. 1962), the petitioner, National Airlines, argued that the Civil Aeronautics Board failed to carry its burden of proof when it required the carrier to establish that it was economically infeasible for it to provide additional service to a community in need of such service. The District of Columbia Circuit concluded that the Board properly placed the burden of producing evidence about economic infeasibility upon the carrier on the ground that: "Economic infeasibility is more like an affirmative defense that an element of the Board's case." 300 F.2d at 715 n. 12. Accord, *Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965).

Moreover, the penalty is not intended to be included within APA section 7(c)'s allocation of burden of production. The text of APA section 7(c), 5 U.S.C. 556(d), distinguishes sanctions, such as the penalty here, from "rules or orders." While the provision distinguishes among "rules," "orders," and "sanctions," it is only "the proponent of a rule or order"—and not the proponent of a sanction—who "has the burden of proof." [6] In addition, the standard of review for sanctions is more deferential than the standard applied to factual findings in on the record hearings. See, *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973). Thus APA section 7(c) does not apply to the Packers Act civil penalty provision.

[6] Section 7(c) later provides that "[a] sanction may not be imposed or a rule or order issued except on consideration of the whose record or parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d). The Packers Act civil penalty provision makes a similar distinction between an "order" and a "penalty." 7 U.S.C. 213(b).

3. Finally, the panel in this case erred in not deferring to the Secretary's consistent interpretation of the statute he administers. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1 (1965). Section 7(c) of the APA applies "except as otherwise provided by statute." In the proceedings he conducts under the APA, the Secretary has consistently interpreted the Packers Act civil penalty provision to place the burden of production on the suspected violator to show that the size of its business or effect of the penalty on continuing to do business warrant a reduction in the penalty. Where the violator fails to produce evidence warranting a reduction, it is presumed that the facts warrant no reduction. See, *e.g.*, *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 173 (1980); *In re Trenton Livestock Inc.*, 41 Agric. Dec. 1965, 1982 (1982).[7] The allocation of the burden of production about the size and economic stability of a violator's business is, in the words of the APA, "otherwise provided by statute" due to the nature of the information required to be considered under the provisions of 7 U.S.C. 213(b). In addition, the legislative history of the Packers Act civil penalty provision supports the Secretary's interpretation. While the House originally proposed a $100,000 maximum civil penalty per violation, the Senate rejected any civil penalty. The present statute reflects the compromise reached in conference which allows a relatively unintrusive $10,000 maximum civil penalty. H.Conf.Rep. No. 94-1391, 94th Cong. 2d Sess. 4, reprinted in [1976] U.S. Code Cong. & Admin News at 2284-85. Finally, the fact that other government agencies, which enforce very similar statutory provisions, also interpret those provisions in an identical manner reinforces the appropriateness of deference in this case.[8]

[7] For the convenience of the Court, copies of these opinions are reproduced in the addendum to this brief.

[8] Bosma had full access to these published decisions setting forth the burdens of the parties in the administrative hearing. Indeed, Bosma cited other Packers Act administrative decisions in his petition for review. (See Bosma Open. Br. at 17, 22). Moreover, the Secretary's procedure of allocating to the suspected violators the burden of producing evidence on size and effect at the time of the hearing (See, *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982) (A copy of which is included in the addendum)) is fully consistent with the usual practice in adjudications and furthers the important policies of finality of judgments and of limiting review to evidence presented to the lower tribunal. This procedure is also less intrusive to the violators than the rule announced by this Court. Thus Bosma had a full opportunity to present relevant evidence and in fact at the hearing and in his brief before this Court appears to have accepted the burden. Nevertheless, if this Court determines that remand is still appropriate in this case, Bosma should have the burden of production in any future administrative reconsideration.

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CONCLUSION

For the foregoing reasons, the case should be reheard and the burden of production allocated to Bosma on the size and effect penalty considerations.

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